Supreme Court, U.S.
FILED

03 604 OCT 20 2003

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No. 03-

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

CATHERINE INGLE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in exempting any "generally applicable" state-law rule from preemption under the Federal Arbitration Act, contrary to other federal and state courts that have held such rules preempted when selectively applied to invalidate arbitration agreements.

STATEMENT OF THE PARTIES AND AFFILIATES

Circuit City Stores, Inc. has no parent company and no publicly held company owns 10% or more of the corporation's stock. No other publicly held corporation or publicly held entity has a direct financial interest in the outcome of this litigation.

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CIRCUIT CITY STORES, INC.,
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Circuit City Stores, Inc. ("Circuit City") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINION BELOW

The opinion of the Ninth Circuit (App. 2a-25a) is reported at 328 F.3d 1165 (9th Cir. 2003). The opinion of the district court (App. 28a) is unpublished.

[1] Circuit City also is simultaneously filing a petition for a writ of certiorari in *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101 (9th Cir. 2003), which raises the same question presented. For the reasons explained in the *Mantor* petition, this Court should grant both petitions or, in the alternative, grant the petition in the present case and hold the petition in *Mantor*.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 13, 2003. A petition for rehearing was denied on July 8, 2003. On September 29, 2003, Justice O'Connor granted Petitioner's application for an extension of time to file a petition for a writ of certiorari until October 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT UNDER RULE 29.4(C)

Because the proceeding draws into question the constitutionality of California's law of unconscionability, as codified in Cal. Civ. Code § 1670.5[2] and as applied in this case, and neither the State nor any agency, officer, or employee thereof is a party, 28 U.S.C. § 2403(b) may apply. No court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(b), certified to the Attorney General of California the fact that the constitutionality of such California statute has been drawn into question.

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[2] Cal. Civ. Code § 1670.5 provides:

(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

STATUTE INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1-16, provides in pertinent part:

> *§ 2* A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

STATEMENT OF THE CASE

This petition seeks review of a Ninth Circuit decision invalidating an arbitration agreement under California's law of unconscionability. The question presented, however, is one of federal law, not state law. Federal law – specifically § 2 of the Federal Arbitration Act ("FAA" or "Act") – governs this case, and prohibits using state-law doctrines like the one applied below to invalidate arbitration agreements.

The decision below applies state unconscionability law in a way that is demonstrably hostile to arbitration, using it to fashion a new rule under which employment arbitration agreements are presumptively unenforceable. That decision is contrary to the terms and purpose of § 2, and in conflict with holdings of other courts. If allowed to stand, it will render meaningless many of this Court's decisions endorsing the use of arbitration in the employment context. This Court should grant review to resolve the conflict among the lower

courts, preserve the vitality of its own decisions, and enforce the FAA and its pro-arbitration policy.

A. Statutory Background

The Federal Arbitration Act, 9 U.S.C. §§ 1-16, was enacted in 1925 to overcome longstanding judicial hostility toward arbitration agreements. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995); *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 220 n.6 (1985). The FAA establishes a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Because "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered," this Court "rigorously enforce[s] agreements to arbitrate." *Byrd*, 470 U.S. at 221. This Court also rejects rules that "res[t] on a suspicion of arbitration," as such views have "fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989).

Section 2 of the Act requires state and federal courts to enforce arbitration agreements as they would any other contract. *See* 9 U.S.C. § 2; *Perry v. Thomas*, 482 U.S. 483, 489 (1987) ("Section 2 . . . embodies a clear federal policy of requiring arbitration . . ."); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (the FAA "make[s] arbitration agreements as enforceable as other contracts"). Section 2 also contains a narrow "saving clause." The clause provides that an arbitration agreement can be invalidated under state law only "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. If a state-law rule would invalidate an arbitration agreement, but that rule does not "exist at law or in equity for the revocation of any contract," the state-law rule is pre-

empted by § 2 of the FAA. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001) (FAA is "pre-emptive of state laws hostile to arbitration").

This Court has broadly construed § 2's preemptive sweep. Of course, state laws that on their face invalidate arbitration agreements are preempted. *See, e.g., Perry v. Thomas*, 482 U.S. at 484 (FAA preempts California statute allowing wage-collection actions to proceed "without regard to the existence of any private agreement to arbitrate"). Also preempted are state laws that on their face impose special conditions on the enforcement of arbitration agreements. *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (FAA preempts Montana law requiring that notice of arbitration be typed in underlined capital letters). Of special relevance here, even state-law rules that do not on their face refer to arbitration are preempted *if* they are applied in an arbitration-specific manner. In *Perry*, for instance, the Court clarified that a general state-law principle – like unconscionability – is preempted by § 2 if its application "takes its meaning precisely from the fact that a contract to arbitrate is at issue." 482 U.S. at 492 n.9. "A court may not . . . rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable. . . ." *Id.*; *see also Doctor's Assocs.*, 517 U.S. at 697 n.3 (quoting *Perry*).

B. Factual Background

In the landmark decision of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court held that statutory claims for employment discrimination could be compelled into arbitration pursuant to mandatory pre-dispute arbitration agreements. In 1995, following *Gilmer* and its progeny, Circuit City implemented a mandatory pre-dispute arbitration program, the Associate Issue Resolution Program,

through which Circuit City and its Associates[3] agree to arbitrate any and all employment-related legal disputes arising between them. Since its implementation, all prospective applicants for employment must agree to participate in this program as a condition of having their job application considered by Circuit City.

On September 9, 1996, as part of the job application process, Catherine Ingle signed a Circuit City "Dispute Resolution Agreement" or "DRA." Circuit City hired Ingle as a Sales Associate in September 1996. During her employment with Circuit City, Ingle requested and was granted several leaves of absence under Circuit City's short-term disability leave policy. Ingle requested and was granted a final short-term disability leave in March 1998, from which she never returned. Ingle's employment was formally terminated in January 1999.

On June 21, 1999, notwithstanding the DRA, Ingle filed suit against Circuit City in the Southern District of California. She asserted several employment-related claims for harassment, discrimination and retaliation under state and federal law, all of which fall squarely within the DRA.

C. Proceedings Below

1. Circuit City filed a motion to compel arbitration. The district court denied the motion, relying on *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1186 (9th Cir. 1998). In *Duffield*, the Ninth Circuit held that claims under Title VII could not be compelled into arbitration pursuant to a mandatory pre-dispute agreement. Noting that Circuit City's arbitration agreement covered Title VII claims, the

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[3] Circuit City refers to all applicants and current and former employees as "Associates."

district court found the DRA unenforceable under *Duffield*. *See* App. 28a.[4]

2. Circuit City appealed. Prior to any briefing or hearing, the Ninth Circuit dismissed the appeal "for lack of jurisdiction," holding that the FAA did not apply to employment arbitration agreements. App. 27a. After this Court held in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), that the FAA does in fact apply to employment contracts, this Court granted a petition for a writ of certiorari in Ingle's case, and vacated and remanded the Ninth Circuit's decision. *See* 532 U.S. 938 (App. 26a).

3. On remand, the Ninth Circuit once again refused to enforce the DRA. This time, the court held that the entire arbitration agreement is unconscionable – and therefore unenforceable – under California law.

The court began by explaining that a contract is invalid under California law if it is both procedurally and substantively unconscionable. App. 6a-7a. According to the Ninth Circuit, procedural unconscionability occurs where there is an "inequality of bargaining power between the parties [that] precludes the weaker party from enjoying a meaningful opportunity to negotiate and choose the terms of the contract." App. 7a. On that ground alone, the court found the DRA procedurally unconscionable: "Because of the stark inequality of bargaining power between Ingle and Circuit City, we conclude that [the DRA] is procedurally oppressive." App. 8a. Of course, this rule would apply in almost all employment situations.

Substantive unconscionability, the Ninth Circuit continued, occurs where the "terms of the agreement . . . are so one-sided as to shock the conscience." App. 10a (citation

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[4] The Ninth Circuit recently overruled *Duffield* in *EEOC v. Luce, Forward, Hamilton & Scripps*, 2003 WL 22251382 (9th Cir. Sep. 30, 2003) (en banc).

and internal quotation marks omitted). The court found the DRA to be "one-sided" because *in practice* it would bind only employees, and not employers, to arbitrate their employment-related claims. App. 12a-13a. In the Ninth Circuit's view, it does not matter whether the text of the agreement commits employers as well as employees to arbitration. The mere fact that the agreement is between an employer and an employee means that it is so "one-sided" as to be substantively unconscionable:

> [Where an] arbitration agreement subjects [an employer] to the same terms that apply to its employees . . . the agreement is one-sided anyway. Because the possibility that [an employer] would initiate an action against one of its employees is so remote, the lucre of the arbitration agreement flows one way . . . . The only claims realistically affected by an arbitration agreement between an employer and an employee are those claims employees bring against their employers.

App. 12a.[5]

In short, the court below established an entirely new rule of substantive unconscionability law: an employment arbitration agreement is one-sided and hence unconscionable, regardless of its express terms, if its *effect* will be felt primarily by employees because their employer has few claims to arbitrate. Moreover, the Ninth Circuit's new doctrine presumes that *all* employment arbitration agreements will have this prohibited effect in practice:

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[5] Because the Ninth Circuit's holding expressly applies *regardless* of the actual terms of an arbitration agreement, it is irrelevant which version of the DRA is in effect in a particular case. App. 4a (discussing version of DRA at issue); *id.* ("our holdings . . . likely extend beyond this particular version" of the DRA); *see Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1108 (9th Cir. 2003) (applying *Ingle* to a revised DRA that expressly confirms that both Circuit City and Associates must arbitrate their claims).

> [A] contract to arbitrate between an employer and an employee . . . raises a *rebuttable presumption* of substantive unconscionability. Unless the employer can demonstrate that the effect of a contract to arbitrate is bilateral . . . with respect to a particular employee, courts should presume such contracts are substantively unconscionable.

App. 13a (emphasis added). In fact, the presumption established below may be "rebuttable" in name only: the court declined to remand the case to give Circuit City any opportunity to demonstrate the requisite bilateral "effect." *See also Mantor*, 335 F.3d at 1108-09 (declining to remand to permit rebuttal of presumption).[6]

Taken together, the Ninth Circuit's holdings on procedural and substantive unconscionability effectively establish a new rule that all mandatory employment arbitration agreements are presumptively unconscionable. Virtually all mandatory employment arbitration agreements will suffer from the defect that the court below labeled procedural unconscionability: an inequality of bargaining power between employer and employee. In addition, according to the court below, all employment arbitration agreements may be *presumed* to be one-sided in actual effect and hence substantively unconscionable. App. 13a, n.10 (coverage of employment arbitration agreements is "typically and grossly one-sided"). In the Ninth Circuit, mandatory employment arbitration agreements are now presumptively unenforceable.

While the Ninth Circuit went on to discuss other aspects of the agreement that it considered to be substantively unconscionable, App. 14a-23a, the actual *holding* of the court

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[6] Had the Ninth Circuit remanded the case, Circuit City would have presented evidence that the company has initiated *more than fifty* arbitrations against Associates over a variety of employment-related legal disputes.

was that the one-sided effect of the agreement – regardless of its express terms – is the sole and sufficient factor rendering the DRA substantively unconscionable: "Circuit City's arbitration agreement expressly limits its scope to claims brought by employees, *which alone* renders it substantively unconscionable. Even if the limitation to claims brought by employees were not explicit, an arbitration agreement between an employer and an employee ostensibly binds to arbitrate only employee-initiated actions. . . . *Therefore*, we conclude that the coverage of the arbitration agreement is substantively unconscionable." App. 14a (emphasis added).[7]

4. Circuit City argued below that the court's use and invocation of the doctrine of unconscionability "singles out arbitration provisions for suspect status" and is therefore preempted by the FAA. App. 6a, n.3. The Ninth Circuit rejected that argument in short order: "Because unconscionability is a generally applicable defense to contracts, . . . courts may refuse to enforce an unconscionable arbitration agreement." App. 5a.

SUMMARY OF ARGUMENT

1. The lower courts are divided on the proper standard for preemption under § 2 of the FAA. In the Ninth Circuit (along with the Second Circuit and the California Supreme Court), a state-law rule that is a "generally applicable" doctrine automatically is exempt from preemption under § 2, even where application of the doctrine is hostile and specific to arbitration. In other courts, even a state-law rule that can be classified as "generally applicable" – like the doctrine of unconscionability – still may not be applied in an arbitration-

[7] The court then stated that "[t]his holding – assuming procedural unconscionability – would suffice to render this agreement unconscionable, but we elect to address other substantive terms of Circuit City's arbitration agreement." App. 14a, n.11. In other words, the court's discussion of the remaining aspects of the DRA is dicta.

specific manner to invalidate arbitration agreements. The latter standard is the correct one, and it leads to a different outcome in this case. The unconscionability law applied below, which creates a presumption against the enforcement of employment arbitration agreements, is obviously arbitration-specific and hence preempted by the FAA.

2. Resolving this conflict and reversing the decision below is of critical importance. This Court repeatedly has held that preemployment arbitration agreements are valid and enforceable under the FAA. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (FAA applies to arbitration agreements between employer and employees); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (employees may be required, as condition of employment, to submit statutory discrimination claims to arbitration). Those decisions are rendered meaningless if a court can opt out of the FAA's mandate simply by invoking some version of state-law "unconscionability" doctrine. Indeed, the Ninth Circuit's broad and sweeping use of unconscionability permits a court to effectively opt out of the FAA entirely. This Court's intervention is necessary if the FAA and this Court's precedents are to have any continuing vitality.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S STANDARD FOR PREEMPTION UNDER THE FAA CONFLICTS WITH THE STANDARD USED BY OTHER COURTS.

A. The Ninth Circuit's Use Of Unconscionability To Void Arbitration Agreements.

"Unconscionability" is not the first tool the Ninth Circuit has used to invalidate arbitration contracts. In *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999), the Ninth Circuit, contrary to the unanimous view of eleven other federal courts of appeals, held that the FAA does not extend to any contracts for employment. *See Circuit City*

Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (collecting cases); *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1060-61 (11th Cir. 1998) (Cox and Tjoflat, JJ.); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835-36 (8th Cir. 1997). In *Adams*, this Court reversed, holding that the FAA does indeed apply to contracts between employers and employees (excepting only the contracts of those employed as transportation workers). 532 U.S. at 109. This Court then remanded to the Ninth Circuit the *Adams* case and similar decisions, including the instant case, that had relied upon the Ninth Circuit's erroneous holding in *Adams*.

Faced with this Court's decision in *Adams*, the Ninth Circuit found a new basis for repudiating employment arbitration agreements. In both *Adams* and this case, both before the Ninth Circuit for the second time, the court invalidated the arbitration agreements in question, relying on the alternative ground of state unconscionability law. *See Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002); App. at 25a.[8]

The Ninth Circuit previously had rejected just this kind of unconscionability argument, holding that the FAA preempts the use of state-law unconscionability doctrine to invalidate arbitration agreements. *See Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286 (9th Cir. 1988); *Bayma v. Smith Barney*, 784 F.2d 1023, 1025 (9th Cir. 1986). Six months after this Court's opinion in *Adams*, however, the Ninth Circuit reversed course, holding an arbitration agree-

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[8] *Compare Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818-19 (11th Cir. 2001) (declining to use alternate grounds to invalidate arbitration agreement after initial ground reversed by Supreme Court: "the last time this case was before us we made the mistake of giving too little weight to the FAA's pro-arbitration policy," and "[w]e decline to make the same mistake again"); *Thomas v. Perry*, 200 Cal.App.3d 510, 514-15 (Ct. App. 1988) (rejecting alternate ground for invalidating arbitration agreement after initial ground reversed by Supreme Court).

ment unconscionable under state law and expressly overruling its prior precedent. *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 941-42 (9th Cir. 2001) (overruling *Cohen* and *Bayma*). Within the next two years, the Ninth Circuit would invalidate another half-dozen arbitration agreements (including the one below) on state-law unconscionability grounds. *See Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101 (9th Cir. 2003) ; *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003) (App. 2a-25a) (opinion below); *Domingo v. Ameriquest Mortgage Co.*, 2003 WL 21675550 (9th Cir. 2003) (unpublished); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003); *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778 (9th Cir. 2002); *Circuit City v. Adams*, 279 F.3d 889 (9th Cir. 2002).

B. A Split Exists Among The Lower Courts On The Standard For Preemption Under Section 2 Of The FAA.

1. In the Ninth Circuit, so long as a state-law rule applies generally to all contracts, and not *solely* to arbitration clauses, it is automatically immune from preemption under § 2. *See* App. 5a-6a & n.3; *see also Ting*, 319 F.3d at 1150 n.15 ("Because unconscionability is a generally applicable contract defense, it may be applied to invalidate an arbitration agreement without contravening § 2 of the FAA."); *Ticknor*, 265 F.3d at 937 ("as long as state law defenses concerning the validity, revocability, and enforceability of contracts are generally applied to all contracts, and not limited to arbitration clauses, federal courts may enforce them under the FAA"). The court does not ask whether a state-law rule has been applied in an arbitration-specific manner, but only whether a state-law rule can be classified, on its face, as one of general applicability. If it can, then it may be used to bar enforcement of an arbitration agreement.

The Ninth Circuit is not alone in taking this position. The Second Circuit and the California Supreme Court have

adopted the same approach. In all three of these courts, a rule that extends to all contracts is *per se* enforceable under § 2 of the FAA, regardless of whether a particular application depends entirely on the fact that an agreement to arbitrate is at issue. According to these courts, a state-law rule is preempted under § 2 only if, on its face, it is limited to certain types of contracts or contract provisions. *See, e.g., Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001) (FAA preempts state statute invalidating out-of-state forum selection clauses in franchise agreements because it applies only to certain provisions of certain contracts); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998) (same); *Armendariz v. Foundation Health Psychcare Servs.*, 6 P.3d 669 (Cal. 2000) (FAA does not preempt state unconscionability doctrine "[b]ecause unconscionability is a reason for refusing to enforce contracts generally").

2. Contrary to these courts, other jurisdictions hold that the mere invocation of a generally applicable rule like "unconscionability" does not end the inquiry into preemption under § 2. Rather, the First and Third Circuits, along with the Alabama Supreme Court, hold that a state-law rule of general applicability is preempted where its application in a particular case singles out, or is specific to, the arbitration context. *See Securities Indus. Assoc. v. Connolly*, 883 F.2d 1114, 1120-21 (1st Cir. 1989); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 182 (3d Cir. 1999); *Ex parte McNaughton*, 728 So.2d 592, 598 (Ala. 1998).

The conflict with the decision below is most obvious in *Ex parte McNaughton*.[9] In *McNaughton*, the plaintiff claimed that an arbitration agreement was unconscionable under state law because only one party to the agreement was

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[9] The California Supreme Court expressly acknowledged a split with *McNaughton*. *See Armendariz*, 6 P.3d at 692 (recognizing conflict with Alabama Supreme Court).

bound to arbitrate and thus waive its right to trial by jury. The Alabama Supreme Court held that such an application of state-law unconscionability doctrine would be arbitration-specific, in that it "depends [] for its application" on the premise that a party is specially disadvantaged by being deprived of a jury trial and relegated to arbitration. 728 So.2d at 598 ("Although the doctrine of unconscionability/mutuality of remedy purportedly could apply in the non-arbitration context . . . it directly depends on arbitration for its application."). As a result, the court concluded, that application of state-law unconscionability doctrine would be preempted under § 2. *Id.* ("[T]his approach [to unconscionability] assigns a suspect status to arbitration agreements. Doing so flies in the face of *Doctor's Associates*, 517 U.S. at 687 . . .").

In *Harris*, the Third Circuit, like the Alabama Supreme Court, held that § 2 preempted application of state unconscionability law. At issue in *Harris* was a claim that an arbitration clause was unconscionable under state law because it appeared in fine print on the back of standard form contract. Despite the fact that the doctrine of unconscionability is generally applicable – a fact that would have been dispositive in the Ninth Circuit – the court held that application of the state law in this context was precluded by *Doctor's Associates*, 517 U.S. at 687, under which "courts may not invalidate arbitration agreements under state laws that single out the provisions of arbitration agreements for suspect status." 183 F.3d at 182-83.

The First Circuit has come to the same conclusion: a state-law rule may not be used to invalidate an arbitration agreement if its application reflects the view that arbitration agreements are specially suspect. In *Connolly*, the court held that a state regulation singling out arbitration agreements for special restrictions was preempted under § 2 – an uncontroversial holding – but went on to make clear that the result

would be the same even if the regulation were on its face generally applicable. As the court explained, a rule that purports to protect against contracts of adhesion generally may not rest on concerns about arbitration agreements in particular. 883 F.2d at 1121 (state "may not say (judicially, legislatively, or in a regulatory mode) that 'adhesion contracts are especially bad when arbitration is included'").

C. The Conflict Among The Lower Courts Is Outcome Determinative.

This case would be decided differently – and the arbitration agreement enforced – under the standard applied in the First and Third Circuits and the Alabama Supreme Court. In those courts, the fact that a state-law rule is a species of the generally applicable unconscionability doctrine is not dispositive. What matters is whether the state-law rule is used in an arbitration-specific manner: whether it "directly depends on arbitration for its application," *McNaughton*, 728 So.2d at 598, or "single[s] out the provisions of arbitration agreements for suspect status," *Harris*, 183 F.3d at 183, or says that "adhesion contracts are especially bad when arbitration is involved," *Connolly*, 883 F.2d at 1121.

The rule applied below is arbitration-specific in the sense described by *McNaughton*, *Harris*, and *Connolly*, and thus preempted. The rule of state-law unconscionability at issue here has two parts. First, the Ninth Circuit conclusively presumes that unequal bargaining power renders all preemployment arbitration agreements contracts of adhesion. Those agreements thus are procedurally unconscionable, because the employee has no choice but to accept the terms of the contract. *Supra* at 7. California law, however, generally does not deem a "take it or leave it" contract procedurally unconscionable *unless* the weaker party truly has no alterna-

tive in the marketplace.[10] Only for preemployment arbitration agreements does the Ninth Circuit completely disregard the alternatives for employment that exist elsewhere. Second, the Ninth Circuit adopts a (purportedly rebuttable) presumption that all preemployment arbitration agreements are substantively unconscionable because in practice – and regardless of their actual terms – they will bind employees but not employers. *See supra* at 8-9. Circuit City has identified no California case law applying the same "one-sided effects" test to any agreement outside of the employment arbitration context. Nor, in any event, does California contract law outside the arbitration context require mutuality of obligation as a pre-condition for enforcement of a contract.[11]

When the two parts – procedural and substantive – are considered together, the arbitration-specific nature of the rule applied below becomes even more manifest. The Ninth Cir-

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[10] *See, e.g., Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178, 1185-86 (Cal. 1976) (health insurance contract with arbitration agreement not a contract of adhesion where plaintiff could have sought insurance elsewhere); *Steven v. Fidelity & Cas. Co.*, 377 P.2d 284, 297 n.11 (Cal. 1962) (agreement not contract of adhesion unless stronger party "has a monopoly (natural or artificial) or because all competitors use the same clauses"); *Freeman v. Wal-Mart Stores, Inc.*, 3 Cal. Rptr. 3d 860, 867 (Ct. App. 2003) (terms not a "take-it-or-leave-it situation" because plaintiff "could simply decline" to enter into agreement and make alternative arrangements); *Cubic Corp. v. Marty*, 229 Cal. Rptr. 828, 833-34 (Ct. App. 1986) (invention agreement is not a contract of adhesion where weaker party has an "opportunity to look elsewhere for a more favorable contract").

[11] *See, e.g., Principal Mut. Life Ins. Corp. v. Vars, Pave, McCord & Freedman*, 77 Cal. Rptr. 2d 479, 490 (Ct. App. 1998) (mortgage agreement provision enforceable despite unilateral nature; "Where sufficient consideration is present, mutuality is not essential."); *Hillsman v. Sutter Cmty. Hosps.*, 200 Cal. Rptr. 605, 611 (Ct. App. 1984) (employment contract enforceable despite unilateral nature; "If the requirement of consideration is met, there is no additional requirement . . . of equivalence in the values exchanged, or 'mutuality of obligation.'") (citation and internal quotation marks omitted).

cuit's new rule amounts to a presumption that all preemployment arbitration agreements are unconscionable and therefore unenforceable. To state the rule is to prove the point; by its own terms, the rule is indisputably arbitration-specific. Furthermore, the rule is arbitration-specific in the worst way, resting on a "broad concern" about the equities of employment arbitration agreements, App. 12a, and specifically about the requirement that employees "waive their right to seek redress in the judicial forum," App. 9a. Whether or not those concerns are well-founded – and this Court has held that they are not, *see infra* at 20-21 – they undeniably reflect precisely the kind of judicial hostility to arbitration that the FAA was enacted to overcome. *See Adams*, 532 U.S. at 122-23 ("[F]or parties to employment contracts . . . there are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context."); *Gilmer*, 500 U.S. at 31 (noting the "simplicity, informality, and expedition of arbitration") (citation and internal quotation marks omitted).[12]

D. The Ninth Circuit's Newly-Created Standard is Incorrect.

The holding below is not only in conflict with decisions of other courts, but also is incorrect. In *Perry v. Thomas*,

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[12] The mere fact that unconscionability is applied to an arbitration agreement does not mean that the doctrine is being applied in an arbitration-specific manner. Rather, the application of the doctrine is arbitration-specific when the only reason the contract is held unconscionable turns entirely on the fact that the contract involves arbitration. In other words, if the application of the rule has no meaning outside the arbitration context – as with the Ninth Circuit's holding that employment arbitration agreements are presumptively invalid – then the application is arbitration-specific. As *Perry* explained, unconscionability cannot be applied in a manner that "takes its meaning precisely from the fact that a contract to arbitrate is at issue." 482 U.S. at 492-93 n.9.

supra, the Court considered almost precisely the question presented here: may state-law unconscionability doctrine be applied to invalidate an arbitration agreement consistent with § 2? The answer was not, as the Ninth Circuit would have it, that unconscionability law is automatically exempted from preemption under § 2 on the grounds that it is generally applicable to all contracts. Instead, an application of state-law unconscionability doctrine *may* be preserved under § 2's saving clause – but only if that specific application "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." 482 U.S. at 492-93 n.9. By contrast, an application of state-law unconscionability doctrine that "takes its meaning precisely from the fact that a contract to arbitrate is at issue" is preempted. *Id.*

The Court made the same point in *Doctor's Associates*, *supra*, in the course of reviewing a state-law notice provision for arbitration agreements. The Court specifically rejected the argument that the notice requirement would be saved from preemption if it were phrased as an arbitration-neutral "illustration of a cross-the-board rule" against adhesion contracts. 517 U.S. at 687 n.3. Even the doctrine of unconscionability may be preempted, the Court explained, if a court "rel[ies] on the uniqueness of an agreement to arbitrate as the basis for a state-law holding that enforcement would be unconscionable." *Id.* (quoting *Perry*, 482 U.S. at 493 n.9).

The opinion below (and the decisions of the Second Circuit and the California Supreme Court) cannot be squared with this Court's statements in *Perry* and *Doctor's Associates*. Nevertheless, these lower courts brush aside this Court's decisions, creating a lower court conflict that is broad and persistent and which leads to the wrong result: the invalidation of arbitration agreements based on the hostile and specific application of a generally applicable state-law

doctrine. The Court should grant review to resolve the conflict and insist on proper enforcement of § 2.[13]

II. THE DECISION BELOW UNDERMINES THIS COURT'S DECISIONS AND THE FAA, AND REQUIRES THE COURT'S IMMEDIATE ATTENTION.

1. In decisions like *Gilmer* and *Adams*, this Court clearly stated that mandatory preemployment arbitration agreements are subject to the enforcement provisions of the FAA. The decision below, on the other hand, effectively renders employment arbitration agreements *unenforceable* under an arbitration-specific application of state-law unconscionability doctrine. If that decision is allowed to stand, then *Gilmer* and *Adams* will be deprived of any practical meaning whenever a court can find a state-law rule that can be pressed into service to invalidate an employment arbitration agreement.

Both *Gilmer* and *Adams* expressly reject arguments against employment arbitration agreements that rest on concerns about an asserted lack of fairness in the arbitration process – and in particular, an asserted lack of fairness to employees. In *Gilmer*, for instance, the Court enforced an arbitration agreement signed as a condition of employment over objections arising from the inequality of bargaining power between employer and employee. Such "generalized

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[13] A similar question was presented in *Cigna Corp. v. Leodori*, No. 02-1680, *cert. denied* Oct. 6, 2003. *Leodori*, however, was a poor vehicle for addressing the question presented. First, because the case arose out of a state court, at least some members of this Court would not have applied the FAA at all. *See Doctor's Assocs.*, 517 U.S. at 689 (Thomas, J., dissenting) ("I remain of the view that § 2 of the Federal Arbitration Act . . . does not apply to proceedings in state courts."). Second, in *Leodori* the state-law rule that invalidated an arbitration agreement was not as clearly arbitration-specific as the rule imposed by the Ninth Circuit in this case. Accordingly, it was not clear in *Leodori* whether the proper § 2 preemption standard would have made a difference to the outcome in that case.

attacks on arbitration," the Court held, are inconsistent with the "federal policy favoring arbitration" in employment as in other areas, and therefore "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." 500 U.S. at 25, 30, 33. In *Adams*, the Court was required to reaffirm that the FAA applies in the employment context – and again to "reject[] the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." 532 U.S. at 123. Indeed, the Court recognized that "for parties to employment contracts . . . there are real benefits to the enforcement of arbitration provisions." *Id.* at 122-23.

The decision below is predicated precisely on the "suspicion" of mandatory employment arbitration agreements, *Gilmer*, 500 U.S. at 27, repudiated by the Court in *Gilmer* and *Adams*. The Ninth Circuit expressly acknowledged its "broad concern with respect to arbitration agreements between employers and employees." App. 12a. That concern manifested itself in a holding that unequal bargaining power between employers and employees, by itself, renders such agreements procedurally unconscionable – precisely the anti-arbitration argument rejected in *Gilmer*. Furthermore, the court below held that it "shocks the conscience" when an arbitration agreement operates *in practice* to bind employees but not employers. Requiring an employee to arbitrate is "unfair," however, only if arbitration itself is considered unfair or disadvantageous. At its core, then, the decision below rests on the view that arbitration is itself unfair or undesirable – precisely the judgments that this Court and Congress have rejected. If a court can bypass *Gilmer* and *Adams* simply by invoking the term "unconscionability," then those decisions become a dead letter.

2. The question presented in this case – whether an arbitration-specific application of a generally applicable state-

law rule is preempted under § 2 of the FAA – is all the more critical because of the broader implications it has for the enforcement of *all* arbitration agreements, not just those in the employment context. Section 2 requires courts to enforce arbitration agreements, notwithstanding state substantive or procedural rules to the contrary, but for a narrow exception for state-law rules that apply to "any contract." The decision below construes the narrow exception so that it swallows the rule, opening a hole in the FAA big enough to encompass any application of state unconscionability doctrine no matter how arbitration-specific in application.

Such a sweeping rule converts state contract law into a license to opt out of the FAA entirely. As its recent arbitration-related docket attests, this Court has devoted substantial resources to elucidating the contours of the FAA and to enforcing the FAA's pro-arbitration mandate.[14] This Court's efforts will be for naught if courts can sidestep the FAA altogether by wielding doctrines like "unconscionability" to invalidate arbitration agreements under state law. The Ninth Circuit has done precisely that in this case and others like it. The question presented here goes to the very core of whether the FAA and arbitration agreements can and will be enforced, and the Court should step in now to resolve the issue.

Indeed, the Ninth Circuit *already* has so capaciously construed the unconscionability doctrine that it invalidates virtually any employment arbitration agreement. It does not matter which state law governs: the Ninth Circuit invalidates

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[14] *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402 (2003); *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037 (2003); *PacifiCare Health Sys. v. Book*, 123 S.Ct. 1531 (2003); *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000); *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000).

arbitration agreements under California law (*Mantor*, *Ingle*, *Ting*, *Ferguson*, and *Adams*), under Montana law (*Ticknor*), and under Hawaii law (*Domingo*). Nor does it matter which company is involved: Circuit City (*Mantor*, *Ingle*, *Adams*), AT&T (*Ting*), or some other company (*Domingo*, *Ferguson*, *Ticknor*). While the court below relied exclusively on one contractual provision to invalidate the DRA, the Ninth Circuit's cases nevertheless deem all manner of provisions to be substantively unconscionable: more limited discovery in arbitration;[15] agreements that either by terms or effect cover the claims of one party, but not the other;[16] agreements that grant one side the unilateral power to modify or terminate the agreement;[17] forum selection clauses;[18] and statutes of limitations.[19] Provisions considered and judged acceptable by the vast majority of courts also fall under the Ninth Circuit's scrutiny. According to the Ninth Circuit, for instance, prohibitions on class actions are unconscionable and invalid. Yet, five other courts of appeals enforce express prohibitions on class actions.[20] The Ninth Circuit also holds that cost-

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[15] *Domingo*, 2003 WL 21675550 at *1; *Ferguson*, 279 F.3d at 786.

[16] *Mantor*, 335 F.3d at 1108-09; *Domingo*, 2003 WL 21675550 at *2; *Ingle*, 328 F.3d at 1173-75 (App. 10a-14a); *Ting*, 319 F.3d at 1149; *Ferguson*, 298 F.3d at 784-85; *Adams*, 279 F.3d at 893-94; *Ticknor*, 265 F.3d at 940.

[17] *Mantor*, 335 F.3d at 1107; *Ingle*, 328 F.3d at 1179 (App. 22a-23a).

[18] *Domingo*, 2003 WL 21675550 at *1.

[19] *Ingle*, 328 F.3d at 1175 (App. 14a-15a); *Adams*, 279 F.3d at 894.

[20] *Compare Mantor*, 335 F.3d at 1107; *Ingle*, 328 F.3d at 1175-76 (App. 15a-17a); *Ting*, 319 F.3d at 1150 (Ninth Circuit cases invalidating prohibitions on class actions), *with Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Burden v. Check Into Cash*, 267 F.3d 483, 492 (6th Cir. 2001); *Livingston v. Associates Fin., Inc.*, 339 F.3d 553, 558-59 (7th Cir. 2003); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 819 (11th Cir. 2001) (all enforcing express class action prohibitions). California courts,

sharing provisions are categorically invalid – a view contrary to that of ten other federal courts of appeals, all of which have concluded that this Court's decision in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000), precludes such a categorical rule.[21] Even provisions permitting motions for summary judgment "shock the conscience" of the Ninth Circuit.[22] In the Ninth Circuit's view, virtually every employment arbitration agreement – or simply every arbitration agreement – can be invalidated under the standard imposed below. Such a result would eviscerate the pro-arbitration policy articulated by Congress in the Federal Arbitration Act. This Court's intervention is necessary to preserve the very core of the FAA.

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too, are divided on this issue of whether holding such a provision unconscionable is a rule preempted by FAA § 2. *Compare Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 1100-02 (Ct. App. 2002) (invalidating agreement on this ground), *with Discover Bank v. Superior Court*, 129 Cal. Rptr. 2d 393 (Ct. App. 2003) (use of unconscionability to invalidate agreement's bar on class action is preempted). The court below, however, simply brushed aside the contrary authority, App. at 17a, n.15, and failed to mention that the California Supreme Court had, one month earlier, granted review to resolve the split, *see* 65 P.3d 1285 (Cal. 2003).

[21] *Compare Mantor*, 335 F.3d at 1107; *Ingle*, 328 F.3d at 1177-78 (App. 19a-21a); *Ting*, 319 F.3d at 1151; *Ferguson*, 298 F.3d at 785; *Adams*, 279 F.3d at 894 & n.5 (Ninth Circuit decisions holding cost-sharing provisions *per se* invalid), *with Rosenberg v. Merrill Lynch*, 170 F.3d 1, 15-16 (1st Cir. 1999); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 610 (3d Cir. 2002); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001); *Williams v. CIGNA Fin. Advisors Inc.*, 197 F.3d 752, 763-65 (5th Cir. 1999); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 658-59 (6th Cir. 2003); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 366 (7th Cir. 1999); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 n.9 (8th Cir. 2001); *Musnick v. King Motor Co.*, 325 F.3d 1255, 1259 (11th Cir. 2003); *Brown v. Wheat First Sec., Inc.*, 257 F.3d 821, 823 (D.C. Cir. 2001).

[22] *Domingo*, 2003 WL 21675550 at *1.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 20, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHERINE INGLE,
Plaintiff-Appellee,

v.

CIRCUIT CITY STORES, INC., a Virginia corporation,
Defendant-Appellant.

ORDER

No. 99-56570
D.C. No. CV-99-01297-EJS

Before: PREGERSON, THOMPSON, and WARDLAW, Circuit Judges.

Appellant's petition for rehearing is denied.

Filed: July 8, 2003.

APPENDIX B

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Catherine INGLE, Plaintiff-Appellee,
v.
CIRCUIT CITY STORES, INC., a Virginia Corporation, Defendant-Appellant.

No. 99-56570.

Argued and Submitted Nov. 5, 2002.
Filed May 13, 2003.

Before: PREGERSON, THOMPSON, and WARDLAW, Circuit Judges.

PREGERSON, Circuit Judge.

This appeal arises from the district court's denial of defendant-appellant Circuit City Stores, Inc.'s (Circuit City) motion to compel arbitration. Circuit City moved to compel arbitration in response to the action plaintiff-appellee Catherine Ingle filed in the Southern District of California, in which she alleged employment discrimination in violation of state and federal civil rights statutes. Circuit City argues on appeal that the district court erred in declining to enforce an arbitration agreement requiring Ingle and Circuit City to arbitrate employment-related legal claims. We have jurisdiction under 9 U.S.C. § 16(a), and we affirm.

FACTS and PROCEDURAL BACKGROUND

In September 1996, Catherine Ingle applied to become an Associate[1] at a Circuit City electronics retail store in San Diego County, California. Ingle was required to sign an arbitration agreement for Circuit City to consider her employment application. By signing the arbitration agreement, Ingle agreed to resolve all employment-related legal claims through arbitration.

On June 21, 1999, Ingle filed this action against Circuit City in the Southern District of California. In her complaint, Ingle alleged claims of sexual harassment, sex discrimination, and disability discrimination under the California Fair Employment and Housing Act, Cal. Gov't Code § 12940, *et seq.* (FEHA). She also alleged claims of sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

On July 16, 1999, Circuit City moved to compel arbitration. On September 22, 1999, the district court entered an order denying the motion on the ground that the arbitration agreement was unenforceable under *Duffield v. Robertson, Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998). The district court held that Circuit City's form application for employment unlawfully conditioned Ingle's employment on her agreement to forego statutory rights and remedies. Circuit City now appeals, arguing primarily that its arbitration agreement is enforceable under *Duffield*[2] and California contract law.

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[1] Circuit City refers to all job applicants and to current and former employees as "Associates."

[2] Because we decide this case solely under California law of unconscionability, we need not reach Circuit City's argument that *Duffield* does not preclude enforcement of its arbitration agreement. *See Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 788 n. 10

STANDARD OF REVIEW

We review de novo a district court's denial of a motion to compel arbitration. *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 936 (9th Cir. 2001), *cert. denied*, 534 U.S. 1133, 122 S.Ct. 1075, 151 L.Ed.2d 977 (2002); *United Food & Commercial Workers Union, Local 770 v. Geldin Meat Co.*, 13 F.3d 1365, 1368 (9th Cir. 1994).

DISCUSSION

I. Circuit City's Arbitration Agreement

Circuit City compels all of its employees and job applicants to sign an arbitration agreement requiring arbitration of all employment-related legal claims. The "Circuit City Dispute Resolution Rules and Procedures" (Rules and Procedures) determine the substance and procedures of the arbitration agreement. Ingle and Circuit City agree that the arbitration agreement Ingle signed provided that the Rules and Procedures governing an arbitration would be those in effect at the time the claim arose. Because the 1998 Rules and Procedures were in effect at the time Ingle's civil rights claims arose, we examine these rules in analyzing whether this arbitration agreement is enforceable. However, our holdings as to substantive unconscionability reside with the discrete provisions we examine, and therefore would likely extend beyond this particular version of the Rules and Procedures.

(9th Cir. 2002) (declining to rule on district court's alternative conclusion that arbitration agreement was invalid under *Duffield* because the court's conclusion under state contract law disposed of the appeal).

II. The Doctrine of Unconscionability

The Federal Arbitration Act (FAA) provides that arbitration agreements generally "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (2002). But when grounds "exist at law or in equity for the revocation of any contract," courts may decline to enforce such agreements. *Id.; Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 683, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); *Ferguson v. Countrywide Credit Indus., Inc.,* 298 F.3d 778, 782 (9th Cir. 2002).

It is a settled principle of law that "arbitration is a matter of contract." *United Steelworkers of America v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). Federal law "directs courts to place arbitration agreements on equal footing with other contracts." *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 293, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002). Arbitration agreements, accordingly, are subject to all defenses to enforcement that apply to contracts generally. *See* 9 U.S.C. § 2 (2002). To evaluate the validity of an arbitration agreement, federal courts "should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). Ingle was employed in California; we therefore evaluate Circuit City's arbitration agreement under the contract law of that state. *Circuit City Stores, Inc. v. Adams,* 279 F.3d 889, 892 (9th Cir.2002) ("*Adams III*"); *see also Ticknor,* 265 F.3d at 937 (applying Montana law to determine whether arbitration clause was valid).

Because unconscionability is a generally applicable defense to contracts, California courts may refuse to enforce an unconscionable arbitration agreement. *See Ferguson,* 298 F.3d at 782. Unconscionability refers to "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the

other party." *A & M Produce Co. v. FMC Corp.*, 135 Cal.App.3d 473, 486, 186 Cal.Rptr. 114 (1982); *see also* U.C.C. § 2-302; Cal. Civ.Code § 1670.5; Restatement (Second) of Contracts § 208 (1981). Thus, a contract to arbitrate is unenforceable under the doctrine of unconscionability when there is "both a procedural and substantive element of unconscionability." *Ferguson*, 298 F.3d at 783; *accord Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669, 690 (2000). Significantly, the California Supreme Court has noted that procedural and substantive unconscionability "need not be present in the same degree." *Id.* In *Armendariz*,[3] the court held that:

> "[e]ssentially a sliding scale is invoked which disregards the regularity of the procedural process of

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[3] At oral argument, Circuit City suggested that *Armendariz* is preempted by the FAA, because its holding, Circuit City asserts, imposes a heightened standard for enforcement of arbitration agreements. We disagree. The Supreme Court has held that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) (emphasis in original). "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts." *Id.* (citations and quotations omitted). However, the California Supreme Court in *Armendariz* did not single out arbitration provisions for suspect status. Rather, the *Armendariz* court applied ordinary principles of contract law in evaluating the arbitration agreement in that case. Because *Armendariz* held that the arbitration agreement at issue was unenforceable under generally applicable California contract law, it was fully consistent with federal law. *See Doctor's Assocs.*, 517 U.S. at 687, 116 S.Ct. 1652; *First Options*, 514 U.S. at 944, 115 S.Ct. 1920. Thus, Circuit City's argument that *Armendariz* imposes a heightened standard for enforcement of arbitration agreements is plainly without merit. *See Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003); *Ferguson*, 298 F.3d at 782-83; *Adams III*, 279 F.3d at 893; *see also Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 130 Cal.Rptr.2d 892, 63 P.3d 979 (2003) (restating the Court's holding in *Armendariz*).

> the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.

Id. at 114 (quoting 15 Williston on Contracts § 1763A, at 226-27 (3d ed. 1972)) (other citations omitted).

A. Procedural Unconscionability

To determine whether the arbitration agreement is procedurally unconscionable the court must examine "the manner in which the contract was negotiated and the circumstances of the parties at that time." *Kinney v. United Healthcare Servs., Inc.,* 70 Cal.App.4th 1322, 1329, 83 Cal.Rptr.2d 348, 352-53 (1999). An inquiry into whether Circuit City's arbitration agreement involves oppression or surprise is central to that analysis. A contract is oppressive if an inequality of bargaining power between the parties precludes the weaker party from enjoying a meaningful opportunity to negotiate and choose the terms of the contract. *Stirlen v. Supercuts, Inc.,* 51 Cal.App.4th 1519, 1532, 60 Cal.Rptr.2d 138, 145 (1997) (citation omitted). "Surprise involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms." *Id.* (internal quotation marks omitted).

There is no doubt that Circuit City's arbitration agreement is oppressive. In *Adams III,* we held that the arbitration agreement at issue in that case was procedurally unconscionable under California law because:

> Circuit City, which possesses considerably more bargaining power than nearly all of its employees or

> applicants, drafted the contract and uses it as its standard arbitration agreement for all of its new employees. The agreement is a prerequisite to employment, and job applicants are not permitted to modify the agreement's terms--they must take the contract or leave it.

Adams III, 279 F.3d at 893. Procedurally, there is absolutely no difference between the version of the arbitration agreement we evaluated in *Adams III* and the version we review in this case. Because of the stark inequality of bargaining power between Ingle and Circuit City, we conclude that Circuit City's 1998 arbitration agreement is also procedurally oppressive. *See id.*; *Ferguson,* 298 F.3d at 783-84; *Armendariz,* 24 Cal.4th at 114-15, 99 Cal.Rptr.2d 745, 6 P.3d at 690; *see also Stirlen,* 51 Cal.App.4th at 1533-34, 60 Cal.Rptr.2d 138 (finding procedural unconscionability when an arbitration clause was part of a contract of adhesion in which the employee was presented with an employment contract on a "take it or leave it" basis).

Circuit City argues that because Ingle had sufficient time--three days--to consider the terms of the arbitration agreement, the court should not find this agreement procedurally unconscionable. We disagree. The amount of time Ingle had to consider the contract is irrelevant. We follow the reasoning in *Szetela v. Discover Bank,* 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862 (2002), in which the California Court of Appeal held that the availability of other options does not bear on whether a contract is procedurally unconscionable. *Id.* at 1100, 118 Cal.Rptr.2d 862. Rather, when a party who enjoys greater bargaining power than another party presents the weaker party with a contract without a meaningful opportunity to negotiate, "oppression and, therefore, procedural unconscionability, are present." *Ferguson,* 298 F.3d at 784; *Szetela,* 97 Cal.App.4th at 1100, 118 Cal.Rptr.2d 862.

Circuit City contended at oral argument that our recent decisions in *Circuit City Stores, Inc. v. Najd,* 294 F.3d 1104 (9th Cir. 2002), and *Circuit City Stores, Inc. v. Ahmed,* 283 F.3d 1198 (9th Cir. 2002), should bear on our analysis regarding procedural unconscionability. However, we clearly stated that the arbitration agreements in those cases were not procedurally unconscionable *only* because Najd and Ahmed each had a meaningful opportunity to opt out of the arbitration program. *See Najd,* 294 F.3d at 1108; *Ahmed,* 283 F.3d at 1200. To invoke the holdings in *Ahmed* and *Najd,* Circuit City must show that it provided Ingle a meaningful opportunity to decline to enter into the arbitration agreement.[4] Ingle had no such opportunity, and therefore our holding in *Adams III* controls in this decision.

The California Supreme Court's decision in *Armendariz* is also instructive in this case. The *Armendariz* court held that it is procedurally unconscionable to require employees, as a condition of employment, to waive their right to seek redress of grievances in a judicial forum. *See Armendariz,* 24 Cal.4th at 114-15, 99 Cal.Rptr.2d 745, 6 P.3d at 690. Circuit City's arbitration agreement similarly requires, as a condition of employment, that employees waive their right to bring future claims in court. *See Ferguson,* 298 F.3d at 784. Ingle had no meaningful opportunity to opt out of the arbitration agreement, nor did she have any power to negotiate the terms of the agreement. Therefore, because Circuit City presented the arbitration agreement to Ingle on an adhere-or-reject basis, we conclude that the agreement is procedurally unconscionable.

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[4] Circuit City does not even consider the applications from job applicants who elect not to enter into the arbitration agreement. Ingle had no meaningful option; she either had to walk away from the employer altogether or sign the arbitration agreement for fear of automatic rejection or termination at the outset of her employment. *See Adams III,* 279 F.3d at 893.

B. Substantive Unconscionability

Substantive unconscionability centers on the "terms of the agreement and whether those terms are so one-sided as to shock the conscience." *Kinney,* 70 Cal.App.4th at 1330, 83 Cal.Rptr.2d 348 (internal quotation marks omitted). In evaluating the substance of a contract, courts must analyze the contract "as of the time [it] was made." *A & M Produce,* 135 Cal.App.3d at 487, 186 Cal.Rptr. 114.

Several substantive terms of Circuit City's arbitration agreement are one- sided. The provisions concerning coverage of claims, the statute of limitations, the prohibition of class actions, the filing fee, cost-splitting, remedies, and Circuit City's unilateral power to modify or terminate the arbitration agreement all operate to benefit the employer inordinately at the employee's expense. Because these one-sided provisions grossly favor Circuit City, we conclude that, under California law, these terms are substantively unconscionable, and address each term in turn.

1. Claims Subject to Arbitration

The one-sided coverage we found objectionable in *Adams III* remains in the version of the arbitration agreement we evaluate in this case.[5] *See Adams III,* 279 F.3d at 893-94.

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[5] Rule 2 of the arbitration agreement provides:

> Except as otherwise limited herein, any and all employment-related legal disputes, controversies or claims *of an Associate* arising out of, or relating to, an Associate's application or candidacy for employment, employment or cessation of employment with Circuit City or one of its affiliates shall be settled exclusively by final and binding arbitration before a neutral, third-party Arbitrator selected in accordance with these Dispute Resolution Rules and Procedures. Arbitration shall apply to any and all such disputes, controversies or claims whether asserted against the Company and/or against any employee, officer, alleged agent, director or affiliate company.

Circuit City's arbitration agreement applies only to "any and all employment-related legal disputes, controversies or claims of an Associate," thereby limiting its coverage to claims brought by employees. By the terms of this agreement, Circuit City does not agree to submit to arbitration claims it might hypothetically bring against employees. Without a reasonable justification for such a glaring disparity based on "business realities," "it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee." *Armendariz,* 24 Cal.4th at 117, 99 Cal.Rptr.2d 745, 6 P.3d at 692; *see* Cal. Civ.Code § 1670.5(b). Therefore, as we held in *Adams III,* this "unjustified one-sidedness deprives the [arbitration agreement] of the 'modicum of bilaterality' that the California Supreme Court requires for con-

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All previously unasserted *Associate* claims arising under federal, state or local statutory or common law shall be subject to arbitration. Merely by way of example, these claims include, but are not limited to, claims arising under the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act (ADA), the Fair Labor Standards Act (FLSA), 42 U.S.C. § 1981, as amended, including the amendments of the Civil Rights Act of 1991, the Employee Polygraph Protection Act, the Employee Retirement Income Security Act (ERISA), state discrimination statutes, state statutes and/or common law regulating employment termination, the law of contract or the law of tort; including, but not limited to, claims for malicious prosecution, wrongful discharge, wrongful arrest/wrongful imprisonment, intentional/negligent infliction of emotional distress or defamation.

Claims by Associates for state employment insurance (e.g., unemployment compensation, workers' compensation, worker disability compensation) or under the National Labor Relations Act shall not be subject to arbitration. Statutory or common law claims alleging that Circuit City retaliated or discriminated against an Associate for filing a state employment insurance claim, however, shall be subject to arbitration.

(emphasis added).

tracts to be enforceable under California law." *Adams III,* 279 F.3d at 894; *Armendariz,* 24 Cal.4th at 117, 99 Cal.Rptr.2d 745, 6 P.3d at 692.

This case presents a broad concern with respect to arbitration agreements between employers and employees. Circuit City argues that the arbitration agreement subjects Circuit City to the same terms that apply to its employees. But this argument is "exceedingly disingenuous,"[6] because the agreement is one-sided anyway. Because the possibility that Circuit City would initiate an action against one of its employees is so remote, the lucre of the arbitration agreement flows one way: the employee relinquishes rights while the employer generally reaps the benefits of arbitrating its employment disputes.[7]

The only claims realistically affected by an arbitration agreement between an employer and an employee are those claims employees bring against their employers.[8] By essen-

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[6] *See Stirlen,* 51 Cal.App.4th at 1540-41, 60 Cal.Rptr.2d 138 (criticizing an arbitration agreement in which the employer "identifies no provision of the . . . contract and no statute likely to give rise to a claim [the employer] would be compelled to submit to arbitration").

[7] *See Armendariz,* 24 Cal.4th at 115, 99 Cal.Rptr.2d 745, 6 P.3d at 690; *see also Ting,* 319 F.3d at 1150 (citing *Mercuro v. Superior Court,* 96 Cal.App.4th 167, 116 Cal.Rptr.2d 671, for the proposition that the "arbitration forum, though equally applicable to both parties ... [is] relevant to finding of unconscionability because 'repeat player effect' rendered provision disadvantageous to weaker party"). *See generally* Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial,* 16 Ohio St. J. on Disp. Resol. 669 (2001).

[8] The list of legal claims the arbitration agreement covers is telling. *See* note 5. The only claims the arbitration agreement mentions expressly as arbitrable are those claims employees would assert against Circuit City. *See Ting v. AT&T,* 319 F.3d at 1149 ("In determining whether an arbitration agreement is sufficiently bilateral, courts assessing California law look beyond facial neutrality and examine the actual effects of the

tially covering only claims that employees would likely bring against Circuit City, this arbitration agreement's coverage would be substantively one-sided even without the express limitation to claims brought by employees.[9]

Thus, we conclude that, under California law, a contract to arbitrate between an employer and an employee, such as the one we evaluate in this case, raises a rebuttable presumption of substantive unconscionability. Unless the employer can demonstrate that the effect of a contract to arbitrate is bilateral--as is required under California law--with respect to a particular employee, courts should presume such contracts substantively unconscionable.[10] *See Ferguson,* 298 F.3d at 784-85; *Adams III,* 279 F.3d at 893-94; *Armendariz,* 24 Cal.4th at 115-17, 99 Cal.Rptr.2d 745, 6 P.3d 669; *Stirlen,* 51 Cal.App.4th at 1536-39, 60 Cal.Rptr.2d 138.

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challenged provision.") (citing *Acorn v. Household Int'l, Inc.,* 211 F.Supp.2d 1160, 1172 (N.D.Cal. 2002); *Szetela,* 118 Cal.Rptr.2d at 868).

[9] *Cf. Ferguson,* 298 F.3d at 784-85; *Adams III,* 279 F.3d at 893-94; *Armendariz,* 24 Cal.4th at 115-17, 99 Cal.Rptr.2d 745, 6 P.3d at 690-92; *Stirlen,* 51 Cal.App.4th 1519, 60 Cal.Rptr.2d 138.

[10] We note that our conclusion is consistent with the federal policy favoring arbitration agreements. The FAA does express Congress's intention to give effect to arbitration agreements generally, but it does not supplant state law governing the unconscionability of adhesive contracts. *Adams III,* 279 F.3d at 895; *Ticknor,* 265 F.3d at 935. We do not here utter a blanket rule outlawing arbitration agreements in the employment context. Rather, consistent with California law, we find the coverage of such arbitration agreements typically and grossly one-sided, and therefore, presumptively substantively unconscionable. An employer may rebut this presumption if it can demonstrate that its contract to arbitrate maintains the 'modicum of bilaterality' required under California contract law. *See Armendariz,* 24 Cal.4th at 117-18, 99 Cal.Rptr.2d 745, 6 P.3d at 692. Moreover, under California contract law, a court may only refuse to enforce a contract or contract provision if it is *both* substantively *and* procedurally unconscionable. *See Ahmed,* 283 F.3d at 1199-1200 (enforcing an arbitration agreement that was substantively unconscionable but lacked procedural unconscionability).

Circuit City's arbitration agreement expressly limits its scope to claims brought by employees, which alone renders it substantively unconscionable. Even if the limitation to claims brought by employees were not explicit, an arbitration agreement between an employer and an employee ostensibly binds to arbitration only employee-initiated actions. Circuit City does not furnish any evidence that would indicate that the coverage of the arbitration agreement is mutual. Therefore, we conclude that the coverage of the arbitration agreement is substantively unconscionable.[11]

2. Statute of Limitations

The Circuit City arbitration agreement states that the form by which an employee requests arbitration:

> shall be submitted not later than one year after the date on which the Associate knew, or through reasonable diligence should have known, of the facts giving rise to the Associate's claim(s). The failure of an Associate to initiate an arbitration within the one-year time limit shall constitute a waiver with respect to that dispute relative to that Associate.

We have already expressly criticized Circuit City's statute of limitations provision, *Adams III,* 279 F.3d at 894-95, finding that Circuit City's "strict one year statute of limitations on arbitrating claims . . . would deprive [Associates] of the benefit of the continuing violation doctrine available in FEHA suits." *Id.* This rule is identical to the one we held unconscionable in *Adams III. Id.* While Circuit City insulates itself from potential damages, an employee foregoes the possibility of relief under the continuing violations doctrine.

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[11] This holding--assuming procedural unconscionability--would suffice to render this agreement unconscionable, but we elect to address other substantive terms of Circuit City's arbitration agreement.

Therefore, because the benefit of this provision flows only to Circuit City, we conclude that the statute of limitations provision is substantively unconscionable.

3. Prohibition of Class Actions

Circuit City's arbitration agreement directs arbitrators not to consolidate claims of different employees into one proceeding and generally prohibits the arbitrator from hearing an arbitration as a class action. We find that this bar on class-wide arbitration is patently one-sided, and conclude that it is substantively unconscionable.

The ability to pursue legal claims in a class proceeding has firm roots in both the federal and California legal systems. The United States Supreme Court has held that the "class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable." *Hansberry v. Lee,* 311 U.S. 32, 41, 61 S.Ct. 115, 85 L.Ed. 22 (1940). The California class action statute "rests upon considerations of necessity and paramount convenience, and was adopted to prevent a failure of justice." *Weaver v. Pasadena Tournament of Roses Ass'n,* 198 P.2d 514, 516, 32 Cal.2d 833, 837 (1948); *see* Cal. Civ. Proc. § 382 (2003); Fed.R.Civ.P. 23.

In *Szetela,* the California Court of Appeal severed a provision barring class-wide arbitration from a credit card company's arbitration agreement. *Szetela,* 97 Cal.App.4th at 1100-02, 118 Cal.Rptr.2d 862. In the court's view, by barring class arbitration in a contract of its own drafting, the defendant "sought to create for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights." *Id.* at 1101, 118 Cal.Rptr.2d 862. The *Szetela* court found the bar

on class arbitration "harsh and unfair" to those who could benefit from proceeding as a class and offensive to the policies underlying class actions, such as promoting "judicial economy and streamlin[ing] the litigation process in appropriate cases." *Id.* at 1101- 02, 118 Cal.Rptr.2d 862.[12] The court reasoned that the

> manifest one-sidedness of the no class action provision at issue here is blindingly obvious.
>
> Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover, because credit card companies typically do not sue their customers in class action lawsuits.

Szetela, 97 Cal.App.4th at 1100-01, 118 Cal.Rptr.2d 862.[13]

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[12] *See also Luna v. Household Fin. Corp. III,* 236 F.Supp.2d 1166, 1178-79 (W.D.Wash. 2002) (finding bar on class-wide arbitration substantively unconscionable); *Acorn v. Household Int'l, Inc.,* 211 F.Supp.2d at 1170-71 (same).

[13] The California Supreme Court touched upon this subject in *Keating v. Superior Court,* 31 Cal.3d 584, 183 Cal.Rptr. 360, 645 P.2d 1192 (1982), *rev'd on other grounds sub nom. Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). That court held that "[i]f ... an arbitration clause may be used to insulate the drafter of an adhesive contract from any form of class proceeding, effectively foreclosing many individual claims, it may well be oppressive and may defeat the expectations of the nondrafting party." *Id.* at 610, 183 Cal.Rptr. 360, 645 P.2d 1192. "Denial of a class action in cases where it is appropriate may have the effect of allowing an unscrupulous wrongdoer to retain the benefits of its wrongful conduct." *Id.* at 609, 183 Cal.Rptr. 360, 645 P.2d 1192 (internal citations, alterations, and quotations omitted). The *Keating* court instructed that an arbitration agreement that automatically eliminates the right to a class-wide proceeding would have the "substantial" effect of contravening the principles behind class action policies and "chilling the effective protection of interests common to a group." *Id.*

The *Szetela* court rejected Discover Bank's bar on class-wide proceedings as substantively unconscionable because the actual effect of the provision was to deny a procedural benefit only its customers would employ. In the context of an arbitration agreement between an employer and an employee, Circuit City adopts just such a provision. We cannot conceive of any circumstances under which an employer would bring a class proceeding against an employee.[14] Circuit City, through its bar on class-wide arbitration, seeks to insulate itself from class proceedings while conferring no corresponding benefit to its employees in return. This one-sided provision proscribing an employee's ability to initiate class-wide arbitration operates solely to the advantage of Circuit City. Therefore, because Circuit City's prohibition of class action proceedings in its arbitral forum is manifestly and shockingly one-sided, it is substantively unconscionable.[15]

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[14] *See Ting,* 319 F.3d at 1150 ("It is not only difficult to imagine AT&T bringing a class action against its own customers, but AT&T fails to allege that it has or would ever do so.").

[15] We again reject the reasoning in *Discover Bank v. Superior Court of L.A. County,* 105 Cal.App.4th 326, 129 Cal.Rptr.2d 393 (2003). *See Ting,* 319 F.3d at 1150 n. 15. The California Court of Appeal in *Discover* held that "section 2 of the FAA, which mandates enforcement of arbitration agreements, preempts any otherwise applicable California judicial law finding class action waivers to be substantively unconscionable and invalid." *Discover,* 105 Cal.App.4th at 345, 129 Cal.Rptr.2d 393. Besides contradicting its own precedent, *see Szetela,* the *Discover* court's conclusion runs contrary to the plain text of § 2 of the FAA as well as established federal judicial precedent interpreting the section. Section 2 of the FAA provides that arbitration agreements are generally enforceable "*save upon such grounds as exist at law or in equity for the revocation of any contract*" 9 U.S.C. § 2 (emphasis added). The Supreme Court has emphasized that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA]." *Doctor's Assoc.,* 517 U.S. at 687, 116 S.Ct. 1652.

4. Filing Fee

Under the terms of the arbitration agreement, to initiate a complaint against Circuit City, an employee must submit an "Arbitration Request Form with a required filing fee of $75 (made payable with a cashier's check or money order to Circuit City Stores, Inc.)." Under California law, "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court." *Armendariz,* 24 Cal.4th at 110-11, 99 Cal.Rptr.2d 745, 6 P.3d 669 (emphasis in original).

Though denominated a "filing fee," the employee-claimant must pay the required seventy-five dollars here directly to Circuit City, rather than to the arbitration service Circuit City identifies in the arbitration agreement. It thus appears that the employee is required to pay Circuit City for the privilege of bringing a complaint. While a true filing fee might be appropriate under *Armendariz,* the fee required by Circuit City is not the "*type* of expense that the employee would be required to bear" in federal court, and is therefore inappropriate under *Armendariz.* Moreover, by requiring

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We also note that our holding is in tension with *Lozano v. AT & T,* 216 F.Supp.2d 1071 (C.D.Cal. 2002). The court in *Lozano* held, *inter alia,* that an arbitration clause prohibiting class actions was not substantively unconscionable, so long as the clause allows the arbitrator to provide for declaratory and injunctive relief under state consumer statutes and authorizes statutory damages on an individual basis. *Id.* at 1076; *see also Arriaga v. Cross Country Bank,* 163 F.Supp.2d 1189, 1195 (S.D.Cal. 2001) (rejecting plaintiff's argument that bar on class-wide arbitration was substantively unconscionable). We reject the reasoning in *Lozano* and *Arriaga* to the extent that it conflicts with our holding that an essentially unilateral bar on class-wide arbitration is substantively unconscionable.

employees to pay the fee to the very entity against which they seek redress, Circuit City may very well deter employees from initiating complaints.

The seventy-five dollar fee poses an additional problem. In federal court, plaintiffs in all types of cases may be exempt from paying court fees upon a showing of indigence. *See* 28 U.S.C. § 1915(a)(1). Circuit City's arbitration agreement, however, makes no similar provision for waiver of the filing fee (or other fees and costs of arbitration). Without such a provision for waiver in cases of indigence, employees in that category might well find it prohibitively expensive to pay seventy-five dollars to file a complaint. For these reasons, the arbitration agreement's fee provision is manifestly one-sided.

We therefore find the fee provision substantively unconscionable.

5. Cost-splitting

We have previously rejected the Circuit City arbitration agreement's cost-splitting provision. *Adams III,* 279 F.3d at 894. In *Adams III,* we held that Circuit City's "fee allocation scheme alone would render an arbitration agreement unenforceable." *Id.* Although in that case we evaluated an older version of the arbitration agreement, the version we review here contains the same provision that "each party shall pay one-half of the costs of arbitration following the issuance of the arbitration award."[16] Moreover, the arbitration agree-

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[16] The costs of arbitration, as defined by the arbitration agreement, include:

> the daily or hourly fees and expenses (including travel) of the Arbitrator who decides the case, filing or administrative fees charged by the Arbitration Service, the cost of a reporter who transcribes the proceeding, and expenses of renting a room in which the arbitration is held. Incidental

ment provides that "the Arbitrator may require the Associate to pay Circuit City's share of the costs of arbitration and incidental costs" should Circuit City prevail at arbitration. Under Circuit City's arbitration agreement, even an employee who has succeeded on her claim against Circuit City could be held liable for her share of the costs of the arbitration, because the arbitrator's authority to require Circuit City to pay in such circumstances is discretionary. Furthermore, the Circuit City arbitration agreement provides that if an employee does not succeed on her claim, the arbitrator has the discretion to charge the employee for Circuit City's share of the arbitrator's services.

By itself, the fact that an employee could be held liable for Circuit City's share of the arbitration costs should she fail to vindicate employment- related claims renders this provision substantively unconscionable.[17] Combined with the fact that Circuit City's fee-splitting scheme would sanction charging even a successful litigant for her share of arbitration costs, this scheme blatantly offends basic principles of fairness. *See Ting,* 319 F.3d at 1151; *Armendariz,* 24 Cal.4th at 110-11, 99 Cal.Rptr.2d 745, 6 P.3d at 687-88. Because Circuit City's cost-splitting provision is harsh and unfair to em-

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costs include such items as photocopying or the costs of producing witnesses or proof.

[17] *Cf. Blair v. Scott Specialty Gases,* 283 F.3d 595, 605-06 (3d Cir. 2002) (holding that an arbitration agreement "would undermine Congress's intent" in enacting civil rights statutes if it prevented "employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require[d] them to pay for a judge in court") (quotations omitted); *Cole,* 105 F.3d at 1484 (noting in the context of an arbitration agreement that the court was "unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case").

ployees seeking to arbitrate legal claims we conclude that it is substantively unconscionable.[18]

6. Remedies

In *Adams III,* we criticized the limitations on available remedies in Circuit City's arbitration agreement.[19] The arbitration agreement we evaluate in this case, as in *Adams III,* similarly "fails to provide for all the types of relief that would otherwise be available in court." *Adams III,* 279 F.3d at 895; *see also Paladino v. Avnet Computer Techs., Inc.,* 134 F.3d 1054, 1059 (11th Cir. 1998) (holding unenforceable an arbitration agreement that limited remedies otherwise available in court).

The Circuit City arbitration agreement delimits what relief is available to employees who succeed in arbitration claims against Circuit City. The agreement grants the arbitrator the discretion to award (1) injunctive relief, including reinstatement; (2) one year of full or partial back pay, subject to reductions by interim earnings or public or private benefits received; (3) two years of front pay; (4) compensatory damages in accordance with applicable law; and (5) punitive damages up to $5000 or the equivalent of a claimant's monetary award (back pay plus front pay), whichever is greater. This provision is identical to the one we held substantively

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[18] Although Circuit City has included provisions in the arbitration agreement limiting an employee's liability for fees, we again reject the provisions because "the default rule is that employees will share equally in the cost of arbitration. As a result, we cannot interpret the agreement to prohibit sharing costs, as the court did in *Cole,* 105 F.3d at 1485, or find the issue of fees too speculative, as in *Green Tree* [*Fin. Corp.-Alabama v. Randolph,* 531 U.S. 79, 91, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000)]." *Adams III,* 279 F.3d at 895 n. 5.

[19] *See Adams III,* 279 F.3d at 895; *see also Morrison v. Circuit City Stores, Inc.,* 317 F.3d 646, 670-74 (6th Cir. 2003) (en banc) (declining to enforce Circuit City's limitations on remedies available under its arbitration agreement).

unconscionable in *Adams III*. *See Adams III*, 279 F.3d at 895; *accord Morrison*, 317 F.3d at 670-74. Because the remedies limitation improperly proscribes available statutory remedies,[20] we again conclude that it is substantively unconscionable.

7. Unilateral termination/modification

Circuit City's arbitration agreement provides that "Circuit City may alter or terminate the Agreement and these Dispute Resolution Rules and Procedures on December 31st of any year upon giving 30 calendar days written notice to Associates." Circuit City, then, may modify or terminate any and all dispute resolution agreements with its employees unilaterally. Notably, the arbitration agreement affords no such power to employees. The United States Supreme Court has held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) (confirming that arbitration under the FAA is a matter of "consent, not coercion"). Although the agreement requires Circuit City to provide exiguous notice[21] to its employees of termination or any modifica-

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[20] The provision places limits on an employee's total damages, while federal law limits only the sum of punitive and certain compensatory damages, *see* 42 U.S.C. § 1981a; 42 U.S.C. § 2000e-5(g)(1), and contravenes federal law by limiting an employee's front-pay award to two years' salary. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848-54, 121 S.Ct. 1946, 150 L.Ed.2d 62 (2001). The provision also improperly limits punitive damages awards. *See Morrison*, 317 F.3d at 672-73.

[21] This "notice" consists of posting "a written notice by December 1 of each year at all Circuit City locations."

tion, such notice is trivial when there is no meaningful opportunity to negotiate the terms of the agreement. By granting itself the sole authority to amend or terminate the arbitration agreement, Circuit City proscribes an employee's ability to consider and negotiate the terms of her contract. Compounded by the fact that this contract is adhesive in the first instance, this provision embeds its adhesiveness by allowing only Circuit City to modify or terminate the terms of the agreement.[22] Therefore, we conclude that the provision affording Circuit City the unilateral power to terminate or modify the contract is substantively unconscionable.[23]

C. Severance

California law grants courts the discretion either "to sever an unconscionable provision or refuse to enforce the contract in its entirety." *Adams III,* 279 F.3d at 895; Cal. Civ.Code § 1670.5(a). In exercising this discretion, courts look to whether the "central purpose of the contract is tainted with illegality" or "the illegality is collateral to [its] main

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[22] *Cf. Dumais v. American Golf Corp.*, 299 F.3d 1216, 1219-20 (10th Cir. 2002) ("allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory"); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 315-16 (6th Cir. 2000) (holding illusory an arbitration contract in which employer reserved right to alter terms "without any obligation to notify, much less receive consent from" the employee); *Hooters of Am., Inc. v. Phillips,* 173 F.3d 933, 939 (4th Cir.1999) (criticizing similarly an arbitration agreement that only the employer could terminate or modify); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1133 (7th Cir. 1997) (same).

[23] Our holding with regard to the provision granting Circuit City the unilateral authority to modify or terminate the arbitration agreement does not collide with that of the Sixth Circuit in *Morrison,* 317 F.3d at 667-68. The court in *Morrison* held that Circuit City's ability to modify or terminate the arbitration agreement unilaterally did not, by itself, render the contract unenforceable. In this case, we hold that the provision is substantively unconscionable. We draw no conclusion as to whether this term, by itself, renders the contract unenforceable.

purpose." *Adams III,* 279 F.3d at 895 (quoting *Armendariz,* 24 Cal.4th at 124, 99 Cal.Rptr.2d 745, 6 P.3d at 696-97). Even though the 1998 arbitration agreement is a revised version of the agreement we held unconscionable in *Adams III,* it is nonetheless permeated with objectionable provisions. While many of the terms of Circuit City's arbitration agreement appear facially neutral, the effect of these provisions is to obstruct its employees' ability to substantiate claims against Circuit City. *See Ferguson,* 298 F.3d at 787 ("While many of its arbitration provisions appear 'equally applicable to both parties, [these provisions] work to curtail the employee's ability to substantiate any claim against [the employer].'") (quoting *Kinney,* 70 Cal.App.4th at 1332, 83 Cal.Rptr.2d 348).

Circuit City correctly argues that the FAA articulates a strong public policy in favor of arbitration agreements. 9 U.S.C. § 2 (2002); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (holding that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"). Nevertheless, this "policy is manifestly undermined by provisions in arbitration clauses [that] seek to make the arbitration process itself an offensive weapon in one party's arsenal." *Kinney,* 70 Cal.App.4th at 1332, 83 Cal.Rptr.2d 348.

While it is within this court's discretion to sever unconscionable provisions, because an "insidious pattern"[24] exists in Circuit City's arbitration agreement "that functions as a thumb on Circuit City's side of the scale should an employment dispute ever arise between the company and one of its employees," we conclude that the agreement is wholly unenforceable. *Adams III,* 279 F.3d at 892. The adhesive nature of the contract and the provisions with respect to coverage of

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[24] *Ferguson,* 298 F.3d at 787.

claims, the statute of limitations, class claims, the filing fee, cost-splitting, remedies, and Circuit City's unilateral power to terminate or modify the agreement combine to stack the deck unconscionably in favor of Circuit City. Any earnest attempt to ameliorate the unconscionable aspects of Circuit City's arbitration agreement would require this court to assume the role of contract author rather than interpreter. Because that would extend far beyond the province of this court we are compelled to find the entire contract unenforceable.[25] *See Ferguson,* 298 F.3d at 787-88; *Adams III,* 279 F.3d at 895-96; *Armendariz,* 24 Cal.4th at 124-27, 99 Cal.Rptr.2d 745, 6 P.3d at 697-98.

CONCLUSION

Because the Circuit City arbitration agreement is unconscionable under California contract law, we affirm the district court's denial of Circuit City's motion to compel arbitration.

AFFIRMED.

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[25] Because we find that numerous provisions in Circuit City's arbitration agreement are substantively unconscionable, we decline to sever particular terms from the agreement, as the Sixth Circuit did in *Morrison.*

APPENDIX C

SUPREME COURT OF THE UNITED STATES

CIRCUIT CITY STORES, INC.

v.

INGLE

No. 99-1648
March 26, 2001.

C.A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Circuit City Stores, Inc.* v. *Adams*, *ante*, p. 105.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CATHERINE INGLE,
Plaintiff-Appellee,

v.

CIRCUIT CITY, a Virginia corporation,
Defendant-Appellant.

ORDER

No. 99-56570
DC# CV-99-1297-EJS
Southern California
(San Diego)

Before: BEEZER, O'SCANNLAIN and THOMAS, Circuit Judges.

Appellee's motion to dismiss this appeal for lack of jurisdiction is granted. *See Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1071-72 (9th Cir. 1999); *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1093 (9th Cir. 1998). Accordingly, the appeal is dismissed.

All pending motions are denied as moot.

DISMISSED.

Filed: January 24, 2000.

APPENDIX E

CATHERINE INGLE,
Plaintiff,

vs.

CIRCUIT CITY, a Virginia corporation;
and DOES 1 through 100, Defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT, CALIFORNIA
Case No. 99 CV 1297S JFS

ORDER DENYING DEFENDANT'S
MOTION TO COMPEL ARBITRATION

This matter came before the Court on August 30, 1998, at 10:30 a.m., on Defendant CIRCUIT CITY's motion to compel Plaintiff CATHERINE INGLE to arbitrate her claims against CIRCUIT CITY. Michael H. Crosby appeared for plaintiff and Rex Darrell Berry and Richard Paul appeared for defendant. The Honorable Edward J. Schwartz presided. For the reasons set forth below, Defendant's motion to compel arbitration is DENIED.

Defendant's form application for employment conditioned plaintiff's employment on her agreement to forego statutory rights and remedies, and so the provisions purporting to require her to arbitrate statutory state and federal employment claims were unenforceable. See Duffield v. Robertson, Stephens & Co., 144 F.3d 1182 (9th Cir. 1998).

For the reasons set forth above, Defendant's motion is DENIED.

Dated Sep. 21, 1999

Edward J. Schwartz
United States District Judge

(3)

No. 03-604

Supreme Court, U.S.
FILED
DEC 24 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

CATHERINE INGLE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. QUESTION PRESENTED

Whether the Ninth Circuit correctly held that an arbitration agreement in an employment contract is unconscionable when i) the employee could not opt out of arbitration or negotiate the terms of arbitration; ii) the agreement to arbitrate expressly bound only the employee, not the employer; and iii) the agreement required arbitration under rules written by the employer that truncated important procedural rights and substantive remedies.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

II. INTRODUCTION

Petitioner Circuit City Stores, Inc. ("Petitioner" or "Circuit City") brings this case, filed by Catherine Ingle ("Respondent" or "Ms. Ingle") in early 1999, to this Court for the second time on an interlocutory matter.

Petitioner asks this Court to grant certiorari to establish as law a statutory interpretation that no state or federal circuit has tested. That is, when a state applies its common law or statutory rules of contract, as it must do pursuant to 9 U.S.C. § 2, the Federal Arbitration Act ("FAA") § 2, it must apply those rules differently to arbitration agreements, forgiving deficiencies that would invalidate other types of contracts. This Court has declined certiorari in other cases raising the FAA preemption issue, including the closely-related case of *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, *cert. den.*, 532 U.S. 938 (2002). This petition is still premature. Moreover, the proposed rule would intrude unjustifiably into a province reserved to the states: the law of contract.

California applies the two-pronged unconscionability test to all contracts, rejecting only those contracts characterized by procedural and substantive one-sidedness. If the Ninth Circuit has misconstrued California law of unconscionability, as Petitioner suggests, it is a mistake for the Supreme Court of the State of California to correct, not the Supreme Court of the United States.

III. STATUTES INVOLVED

The Federal Arbitration Act, 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*.

California Civil Code ("CC") § 1670.5(a) reads:

> (a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

IV. STATEMENT OF THE CASE

A. Factual Background

Ms. Ingle applied for the position of sales associate at Circuit City in San Diego, California in September 1996. At the time of application, she was given forms and told where to sign. Ms. Ingle was not given an opportunity to read the forms she was told to sign. She never was offered the opportunity to "opt-out" of the compulsory arbitration

program. She never was given the opportunity to negotiate any term of the agreement.

Ms. Ingle was not shown any dispute resolution rules; no one in management explained them to her. She never saw the rules contained in Circuit City's Dispute Resolution Agreement ("DRA") at any time she worked on the job. She was never advised of any changes in the rules.

Ms. Ingle twisted her back at work helping to transport a wide-screen television in December 1997. She was placed on a five-week leave of absence. At about that time, her supervisor Keith Anderson, whose sexual advances toward Ms. Ingle approached stalking, became angry that she had rejected him. When Ms. Ingle returned to work in January 1998, she presented Anderson with a doctor's written instructions that her work hours and lifting be limited strictly. Anderson, though, assigned her to work up to 60 hours in a week, with heavy lifting. Ms. Ingle reported the harassment to store manager Eric Gibbs. His statements, actions and inactions caused further and far greater damage, so Ms. Ingle reported the harassment to Circuit City through its purportedly confidential "cool-line." Cool-line personnel immediately contacted Mr. Gibbs, and he confronted Ms. Ingle in an angry and threatening manner. Soon thereafter she contacted Circuit City's Western Regional Manager. No one at Circuit City responded to her report by informing Ms. Ingle of the dispute resolution rules. No one gave her a claim form to file.

Ms. Ingle retained an attorney, her counsel of record. Circuit City's in-house attorney sent a copy of its purported dispute resolution rules in mid-April 1998. Ms. Ingle's counsel contacted the two leading alternative

dispute resolution providers in San Diego, J.A.M.S./ Endispute ("J.A.M.S.") and AAA. He provided them with copies of Circuit City's arbitration agreement and rules. He inquired whether either firm would administer an arbitration under those rules. Both neutral providers refused to administer arbitration under Circuit City's one-sided rules.

B. Procedural History

Plaintiff filed her Complaint for Sexual Harassment [California Government Code ("Gov.C.") § 12940(h)]; Failure to Prevent Sexual Harassment [Gov.C. § 12940(i), (h)(3)]; Unlawful Employment Discrimination on the Basis of Gender or Physical Handicap [Gov.C. § 12940(a)]; Retaliation for Protesting Sexual Harassment [Gov.C. § 12940(f)]; Failure to Reasonably Accommodate Physical Handicap [Gov.C. § 12940(k)]; Gender Discrimination and Harassment [42 U.S.C. § 2000e]; Retaliation for Reporting Employment Discrimination [42 U.S.C. § 2000e] on June 21, 1999.[1] No answer has been filed by Petitioner. Defendant filed a motion to compel arbitration on July 16, 1999. The motion was based in part on the Declaration of Pamela Parsons and Exhibits A and B thereto. Plaintiff filed her response on August 16, 1999. The opposition was supported by declarations by attorney Michael Crosby (with exhibits) and Catherine Ingle.

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[1] A prior, more limited version of this complaint (Case No. 99 CV 0181J JFS) was filed on March 3, 1999 and dismissed for lack of subject matter jurisdiction on May 24, 1999.

The motion was heard and denied by the late Honorable Edward J. Schwartz on August 30, 1999. (Transcript of Hearing, 8/30/99, is Appendix 1.) A written order was signed on September 21, 1999 and entered September 22, 1999.

Defendant filed its notice of appeal on October 5, 1999. Respondent filed her motion to dismiss the appeal on November 19, 1999. The motion to dismiss was granted on January 24, 2000.

Petitioner sought a writ of certiorari which this Court held, then granted on March 26, 2001 after it ruled in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).[2]

After renewed briefing, on May 23, 2003 the Ninth Circuit filed its decision affirming the District Court's denial of Petitioner's motion to compel Respondent's claims to arbitration. (*Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003).)

Petitioner filed a motion for rehearing that was denied on July 8, 2003. This petition followed.

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[2] *Adams* was remanded and the Ninth Circuit found an essentially identical version of the DRA to be unconscionable. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002). Circuit City petitioned this Court for writ of certiorari. Certiorari was denied (532 U.S. 938). The *Adams* petition presented two questions, one of which was the same in essence as the question presented here and in the petition filed in *Circuit City Stores, Inc. v. Mantor*, No. 03-605, to reverse *Mantor v. Circuit City Stores, Inc.*, 335 F.3d 1101 (9th Cir. 2003).

C. Lower Court's Analysis of the Document in Issue

The appellate court rested its decision to affirm on its determination that the 1998 version of the arbitration agreement was unconscionable under state law.[3] The court identified one DRA "rule" after another that was so oppressive that the agreement overall was substantially unconscionable: (1) it bound employees, but not the employer, to arbitrate claims (Pet.App. 10a-14a and footnote 5); (2) the statute of limitations was too restrictive, and would deprive discrimination claimants like Ms. Ingle of the benefit of the continuing violation doctrine (Pet.App. 14a-15a); (3) it prohibited class actions (Pet.App. 15a-17a); (4) it required even indigent claimants to pay a fee to Circuit City to initiate the claim (Pet.App. 18a-19a); (5) it required the employee to pay the employer's attorneys fees and costs if she failed to prove her claims (Pet.App. 19a-21a); (6) it truncated or denied remedies, including injunctive relief, full back-pay, adequate front pay, compensatory damages equivalent to those available in court, and punitive damages over $5,000 or an amount based on the pay award (Pet.App. 21a-22a); (7) it gave Circuit City the unilateral right to modify or terminate the agreement, or any of its terms, including the rules (Pet.App. 22a-23a); so (8) it was so pervasively oppressive that the unfair provisions could not be severed without a complete redrafting of the contract by the court (Pet.App. 23a-26a).

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[3] Petitioner attached the 1998 DRA as an exhibit to the declaration of Pamela Parsons in support of the motion to compel arbitration.

The Circuit City DRA the Ninth Circuit reviewed fails utterly to meet this Court's standard of fairness, and its requirement that employees receive the full benefit of the laws, whether in open court or closed arbitration. (*See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647 (1991).) Given the manifold provisions that deny Petitioner's employees substantive rights guaranteed by law, Petitioner's agreement fails to measure up to standards established firmly by this Court.

V. REASONS THIS PETITION SHOULD NOT BE GRANTED

A. No Actual Dispute Exists Concerning the Construction of FAA Section Two's Savings Clause

A petition for writ of certiorari will only be granted where a case involves a federal question of general importance or where there is a split among circuit courts of appeal. (*See* 28 U.S.C. §§ 1254, 1257; *Fields v. United States,* 205 U.S. 292 (1970).) Petitioner here argues mistakenly that a split exists among the lower courts regarding the question of when state law rules that would invalidate an arbitration agreement are preempted under FAA Section 2. Specifically, Petitioner admits that the Ninth Circuit, Second Circuit and California Supreme Court hold that state law rules such as the doctrine of unconscionability fall within the category exempted from preemption by FAA Section 2. However, in a strained effort to identify opposition to the Ninth Circuit, Second Circuit and California Supreme Court views, Petitioner concludes, without citing a single case in actual support of its proposition, that the First Circuit, Third Circuit and Alabama Supreme Court hold a contrary view. Petitioner contends

that these courts conduct a sort of self-critical assessment to assure that when it applies that state's doctrine of unconscionability to an arbitration agreement, it does not apply that law in an arbitration-specific manner.

This is not the law as declared by this Court in *Perry v. Thomas*, 482 U.S. 483 (1997) or *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681 (1996). Those opinions require that no statutes be written to regulate arbitration agreements alone, as the California and Montana statutes in *Perry* and *Casarotto*, respectively, were directed. At its broadest, this Court in *Perry*, at footnote 9, requires that contract law of general application, such as the rule of unconscionability, may not be used to invalidate arbitration agreements simply because such agreements compel disputants to present their claims to an arbitrator rather than a judge.

The opinion in *Ingle* does not offend the *Perry/ Casarotto* principle, and it does not conflict in a jurisprudentially-significant manner with the three principal cases cited by Petitioner.

1. The *McNaughton* Case

Petitioner's argument in support of preemption is facially inconsistent and seeks to fabricate a conflict among the state and lower courts that does not exist. Specifically, Petitioner argues incorrectly that the Alabama courts imply an extra analytical step not required by the express saving clause of Section 2. The rule Petitioner perceives would require a court to determine whether a generally applicable state law rule of contracts is applied in an arbitration-specific manner. However, the exact opposite is true under Alabama law. Alabama courts

concur with the Ninth Circuit, Second Circuit and the California Supreme Court, holding that "state law, as it applies generally to all contracts, may be applied to test validity, revocability, and enforceability of particular arbitration agreements under FAA." (*Young v. Jim Walter Homes, Inc.*, 110 F.Supp.2d 1344 (M.D. Ala. 2000).) Generally-applicable state contract defenses such as fraud, duress or unconscionability may be applied without conflict with the FAA. (*General Motors Corp. v. Stokes*, 2003 WL 22419473 (Ala. 2003).)

The Alabama Supreme Court opinion in which Petitioner divines the clearest articulation of the principle it advances, *Ex parte McNaughton*, 728 So.2d 592 (Ala. 1998), does not support its construction of Section 2 at all. Plaintiff in *McNaughton* brought a claim for fraud and interference with business relations. Employer moved to compel arbitration, and the motion was granted. The Alabama Supreme Court, in a 5-4 opinion, disavowed what the majority characterized as dictum in *Northern, Ltd. v. James*, 694 So.2d 1329, 1338 (Ala. 1997). (*Id.* at 597.)

The *McNaughton* majority noted that the employee had challenged the arbitration on only one basis: "Mutuality of remedy." (*Id.* at 598, n.6.) The *McNaughton* majority noted that under Alabama law the contract doctrines requiring mutuality and those requiring conscionability are "distinct doctrines." As such, *McNaughton*'s holding is not based on unconscionability at all. It merely holds that a contract that requires an employee to arbitrate all legal and equitable claims, but does not bind the employer similarly, is enforceable under Alabama law against a mutuality of remedy challenge.

2. The *Harris* Case

Petitioner finds support for its thesis in *Harris v. Green Tree Financial Corporation*, 183 F.3d 173 (3rd Cir. 1999). *Harris* provides no help. The Third Circuit applies federal unconscionability law. Nothing in *Harris* suggests even indirectly that Petitioner's two-step analysis is necessary. At most, it echoes *Casarotto*.

Perhaps the result under California law would differ from that reached under the law of unconscionability applied by Pennsylvania federal and state courts. The result is of no consequence. The question is whether the Third Circuit (and Pennsylvania) applies the same test as the Ninth Circuit (and California). It appears that it does. The conflict Petitioner perceives is an illusion.

3. The *Securities Industry Association* Case

Finally, Petitioner submits that *Securities Industry Association v. Connolly*, 883 F.2d 1114 (1st Cir. 1989) buttresses its position. It does not. This opinion considers whether "certain regulations, Mass.Regs.Code tit. 950, §§ 12.204(G)(1)(a)-(c) (Regulations) . . . are preempted by the FAA." (*Id.*, 883 F.2d at 1116.) The Regulations governed the conduct of securities sales within the Commonwealth of Massachusetts. Specifically, it examined provisions of the Regulations addressing directly what securities brokers must do with respect to voluntariness, conspicuousness and disclosure of the legal effect of predispute arbitration agreements. (*Id.* at 1117.)

Such express limitations on arbitration agreements are precluded clearly by *Perry v. Thomas* and *Doctor's Associates v. Casarotto*.[4] *Securities Industry Associates* does not address any of the "grounds as exist at law or in equity for the revocation of any contract." (FAA § 2.) There is no conflict here that rises to the level at which Supreme Court review is appropriate. Indeed, the opposite is true. More states and circuits must weigh in on the issue Petitioner presents before it is ripe for debate in this Court.

It is indeed possible that California courts or the Ninth Circuit interpreting California law would decide that Civil Code § 1670.5 would preclude enforcement under *McNaughton*'s facts. However, that only proves that Alabama courts may apply to common law of mutuality of obligation in a way that occasionally produces results different from those that might occur when California courts apply CC § 1670.5. That is not necessarily bad. It is implicit in the philosophy of federalism and, indeed, the saving clause of FAA Section 2.

4. No Court Has Endorsed Petitioner's Self-Serving Interpretation of FAA Section Two

Petitioner acknowledges that "Section 2 of the Act requires state and federal courts to enforce arbitration agreements as they would any other contract." *(See* Petitioner's Brief, page 4.) Petitioner attempts to reconstruct

[4] In fact, the Regulations are similar in effect to the statutes this Court struck down in *Perry v. Thomas* and *Casarotto*.

the express exemption provision of Section 2 to require lower courts to conduct an extra inquiry to determine whether the otherwise unambiguous exemption applies *differently* and *less favorably* to pre-employment arbitration agreements than any other agreements. What Petitioner is really asking this Court is to rewrite the FAA to direct lower courts *not* to treat arbitration agreements as they would *any other contract*, as the law currently mandates.

No Circuit or state court has endorsed the interpretation Petitioner advances. Neither the State of Alabama nor the Third Circuit calls for a special interpretation of arbitration agreements. Contrary to Petitioner's argument, the Third Circuit is in line with the Ninth Circuit, the Second Circuit as well as the California Supreme Court. The Third Circuit requires that its courts evaluate general state law doctrines such as unconscionability in the context of arbitration agreements the way they would evaluate application of such doctrines with *any other contract*. (*Blair v. Scott Specialty Gases,* 283 F.3d 595, 603 (3rd Cir. 2002) (a federal court must generally look to the relevant state law on the formation of contracts to determine whether there is a valid arbitration agreement under the FAA); *Harris v. Green Tree Financial Corp., supra,* 183 F.3d at 178 (arbitration agreements are placed upon the same footing as other contracts and are only enforceable to the extent as other contracts are enforceable).)

Similarly, the First Circuit agrees that arbitration agreements are to be afforded no more or no less protection than *any other contract*. (*See DiMercurio v. Sphere Drake*, 202 F.3d 71, 80-81 (1st Cir. 2000) (arbitration agreements are enforceable except in circumstances that would invalidate any other contract; one-sided agreements

to arbitrate are not favored).) Thus, it is apparent why Petitioner failed to cite to any case authority directly supporting its construction of FAA Section 2 from the First Circuit, Third Circuit, or Alabama courts: there is none.

B. Cases Applying Cal. Civ. C. § 1670.5 to Arbitration Agreements Balance Competing Public Interests

Petitioner in effect asks this Court to order California's courts to interpret the state's own statutes differently. The California Arbitration Act (California Code of Civil Procedure ("CCP") §§ 1281-1294.2), like the FAA, 9 U.S.C. §§ 1-16, is construed to favor arbitration. Since the FAA defers construction of the contract defenses in the saving clause of Section 2 to state law (*see First Options of Chicago v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920), the state and federal policies favoring arbitration must be balanced against the policy permitting enforcement of only those contracts that are formed without duress, deceit or undue influence, and are not unconscionable.

California's Supreme Court has struggled to balance these public policies in a number of contexts, including consumer credit, real estate and mortgages, medical malpractice and, as here, pre-employment arbitration agreements. The court struck that balance in the compulsory pre-employment arbitration context in *Armendariz v. Superior Court*, 24 Cal.4th, 6 P.2d 669 (2000) and *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 63 P.3d 979, *cert. den.*, 124 S.Ct. 83 (2003).

Petitioner would prefer that California would strike this balance other than it did in *Armendariz*. It petitions

this Court to order California to weigh the respective policies differently. This Court should decline, as it typically does, to re-order state policy choices by fiat.

C. The law to be applied to determine whether a contract is unenforceable for unconscionability is the state law applicable to contracts generally

(*Doctor's Associates, Inc. v. Casarotto, supra*, 116 S.Ct. 1652 (1996).)

> Repeating our observation in *Perry* [*v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520 (1987)], the text of § 2 declares that state law may be applied "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." [Citation.] Thus, generally applicable defenses, such as . . . unconscionability, may be applied to invalidate arbitration agreements without contravening § 2. [Citations.]
>
> Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. [Citation.]

517 U.S. at 686-687, 116 S.Ct. at 1656. Thus, the FAA *requires* that state law principles be applied to assess the enforceability of this agreement.

In fact, *Casarotto* was relied on in a case decided recently by the Ninth Circuit. In *Ticknor v. Choice Hotels Int'l. Inc.*, 265 F.3d 931 (9th Cir. 2001), this court overruled precedent set in *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282 (9th Cir. 1988) and *Bayma v. Smith, Barney, et al.*, 784 F.2d 1023 (9th Cir. 1985), for the contrary proposition that state law principles may not be applied in a case governed by the FAA. The court in

Ticknor found those decisions to conflict with this Court's holding in *Casarotto* that under the FAA, "generally applicable [state law] contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [9 U.S.C.] § 2." *Ticknor, supra,* 265 F.3d at 937. It stated:

> The Supreme Court's decision in *Doctor's Associates* [*v. Casarotto*] does, however, cause us to reconsider our prior decision in *Cohen* . . . and *Bayma*. . . . Because certain aspects of *Cohen* and *Bayma* cannot be reconciled with [*Casarotto*], we must overrule them insofar as they hold that state law adhesion contract principles may not be invoked to bar arbitrability of disputes under the Arbitration Act.

Id. at 941-942.

California courts treat mandatory arbitration contracts no differently from other similar contracts. That is because California law (CCP §§ 1281 *et seq.*) and public policy favor the enforcement of arbitration agreements. California's strong policy favoring arbitration has been noted affirmatively as being in conformity with the strong federal policy favoring arbitration of disputes. (*Reiss v. Murchison*, 384 F.2d 727, 734 (9th Cir. 1967).)

D. The Ninth Circuit Enforces Employment Arbitration Agreements That Demonstrate a Modicum of Bilaterality or Where Circumstances Show That the Employee Had a Meaningful Opportunity to Choose

Petitioner's argument boils down to the proposition that the Ninth Circuit in *Ingle* "effectively establish[ed] a

new rule that all mandatory employment arbitration agreements are presumptively unconscionable." (Pet. Brief at 9.) This characterization is wrong.

The Ninth Circuit has upheld *non-mandatory* arbitration agreements against unconscionability challenges. The most obvious refutation of Petitioner's proposition is found by contrasting *Ingle* and *Mantor* with two other Ninth Circuit cases examining Circuit City's DRA, *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104 (9th Cir. 2002) and *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002).[5]

Briefly stated, in *Najd* and *Ahmed* the employees had a meaningful opportunity to accept or reject the arbitration program. They did not reject it. The Ninth Circuit compelled both employees to arbitrate their claims, even though they would be required to do so under the same oppressive rules detailed in the *Ingle* and Ninth Circuit *Adams* opinions.[6]

As *Ingle* frames the rebuttable presumption of substantive unconscionability, it requires three findings: (1) the employer made the provision a mandatory prerequisite to employment; (2) the employee had no meaningful opportunity to negotiate its terms; and (3) the agreement binds only the employee, not the employer, to negotiate. (*Ingle* at 13a.)[7] The employer may then present evidence

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[5] These cases are discussed in the Brief in Opposition filed in the *Mantor* case, No. 03-605.

[6] *See also, Ticknor, supra,* 265 F.3d at 939-940.

[7] Contrary to Petitioner's suggestion that the 1998 DRA is not expressly limited to "Associates"; the contract states, *inter alia*, that it

(Continued on following page)

that the provisions are fair. If they are, the contract will be enforced.

In this particular case, the court analyzed a mandatory agreement that was so oppressive that it could not be remedied, only rewritten. It contained limits on the time in which claims could be brought, severe limits on remedies; an intimidating cost-shifting provision that contravened established employment discrimination law; and, overall, it placed near-total control over employment dispute resolution in the hands of the employer.

Almost all arbitration agreements are more fair than Petitioner's. The great majority of arbitration agreements are enforced in California. Nothing in the *Ingle* opinion prevents the enforcement of reasonably fair arbitration agreements arrived at in a reasonable manner.

E. California's Unconscionability Statute Applies Consistently to A Wide Array of Contracts

1. The Test To Identify Procedural Unconscionability In *Ingle* Is Applied To Contracts of All Sorts

Petitioner argues at page 4 that the test of procedural unconscionability, focusing on inequality of bargaining power and the presence or absence of a meaningful opportunity to negotiate contract terms, "would apply in almost

---

applies only to "any and all employment-related legal disputes, controversies or claims *of an associate*." (*Id.* at 11a.)

all employment situations." This is true only when employers have no meaningful opportunity to negotiate contract terms. The courts have acted legitimately and in harmony with the FAA when they have drawn *employment-specific* standards for scrutinizing arbitration agreements.

Civil Code § 1670.5 and court opinions construing it are founded in established common law principles of contract interpretation. The unconscionability doctrine has been "recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." (*Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965), cited in Farnsworth, *Farnsworth on Contracts* (Supp. 1998) § 4.28, p. 195; *see also* Restatement 2d, *Contracts*, § 208 and *official comments* thereto; Lord, *Williston on Contracts* (4th ed.) § 18.10 (1998) and cases collected therein; UCC 2-302; 1 Witkin, *Summary of California Law* (9th ed.), Contracts §§ 23-26 (1987).

The test to identify adhesion and procedural unconscionability stated in *Ingle* is applied commonly to all contracts – not just arbitration provisions and not just in the employment context. (*See, e.g., Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering*, 89 Cal.App.4th 1042, 1052, 107 Cal.Rptr.2d 645 (2001) (indemnity agreement in commercial contract); *Perdue v. Crocker National Bank*, 38 Cal.3d 913, 925, n.9, 702 P.2d 503 (1985) (bank charges for insufficiently funded checks).) California courts and the Ninth Circuit apply this same test to arbitration provisions in employment contracts. When Petitioner argues that this application is unfair and discriminatory, what it seeks is a special

exemption for employers from the widely-recognized principle that finds contracts imposed by one party on the other on a take-it-or-leave-it basis to be procedurally unconscionable.

2. The Rebuttable Presumption of Substantive Unconscionability Announced In *Ingle* Is Applicable to Various Commercial or Consumer Contract Provisions

The presumption of substantive unconscionability that concerns Petitioner is raised by "a contract to arbitrate between an employer and an employee. . . . " There are two elements that must combine: (i) the arbitration provision imposed without meaningful opportunity to negotiate; and (ii) the employment relationship. This presumption is merely a recognition that the disproportionate negotiating power that inheres in the relationship between employer and employee will most often result in a provision disproportionately favorable to the more powerful party, the employer. The evidentiary burden simply is shifted to the employer to show that whichever party had the power edge and whether the parties actually negotiated the provision or not, the resulting agreement is a fair one.

Petitioner claims that the principle announced in *Ingle* applies only to arbitration agreements, and this offends FAA Section 2. But it is far too early to say that. The presumption may well be adopted by California courts and applied (i) to any contract alleged to be unconscionable; and (ii) to mortgage, banking or other commercial or consumer contracts. After all, the test for substantive unconscionability cited in *Ingle* was articulated first in the

hornbook opinion, *A & M Produce Co. v. FMC Corp.*, 135 Cal.App.3d 473, 486, 186 Cal.Rptr. 114 (1982), a commercial contract case. If the rule originating in a commercial, non-arbitration case may be applied to an employment arbitration case, there is good reason to expect that a corollary of that rule, applied initially in an employment arbitration context, would be applied when circumstances suggest that a non-arbitration provision in a commercial contract resulted from an imbalance in the parties' negotiating power.

The California courts as well as the Ninth Circuit (or other circuits) may well apply the presumption announced in *Ingle* contexts outside of arbitration. It is certainly too early to say they would not. Certiorari based on Petitioner's presumption that *Ingle's* interpretation of California unconscionability law *does and must* conflict with Section 2 of the FAA is thus premature, at best. As this Court has instructed, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening federal law." (*Doctor's Associates v. Casarotto, supra*, 517 U.S. at 686-687.)

F. California Utilizes Rebuttable Presumptions to Resolve a Variety of Contract Issues

Circuit City notes that the *Ingle* court in its footnote 9 found that a party seeking to enforce a compulsory pre-employment arbitration agreement bears the burden to show that the adhesive provision is substantively fair. Contrary to Circuit City's suggestion, though, such reversed burdens arise in various aspects of California contract law.

In *Jacobs v. Tenneco West,* 186 Cal.App.3d 1413, 1417, 213 Cal.Rptr. 351 (1986), the court considered an established principle of contract performance: "'[w]here a party's breach or non-performance contributes materially to non-occurrence of a condition of one of his duties, the non-occurrence is excused.' (Restatement 2d, *Contracts, supra,* § 245, p. 259)." (*Jacobs, supra,* 186 Cal.App.3d at 1417.) The *Jacobs* appellate panel inferred, then, that in such a case where the condition failed to occur, *the usual burden of proof was reversed,* so that Tenneco West, the breaching party, was required to prove that the condition (approval of the litigated contract by the company's board of directors) would not have occurred even if it had performed its contractual obligations. (*Id.* at 1418.)

In all sorts of contract cases, the burden to prove that damages sought by an innocent, non-breaching party are too uncertain to be recovered is placed on the shoulders of the party who breached the contract. (*See Israel v. Campbell*, 163 Cal.App.2d 806, 816, 330 P.2d 83 (1958); *Brawthen v. H & R Block*, 52 Cal.App.3d 139, 148, 124 Cal.Rptr. 845 (1975); *Mahoney v. Founders Ins. Co.*, 190 Cal.App.2d 430, 12 Cal.Rptr. 114 (1961)).

These commercial contract cases are analogous to mandatory arbitration cases. Once the plaintiff establishes the preliminary fact (failure to perform obligation [*Jacobs*], breach of contract [*Israel, Brawthen, Mahoney*], inequality of bargaining power resulting in adhesive employment arbitration agreement [*Ingle*]), then the presumption arises and the usual burden is reversed. By reversing the burden of proof in the instance of arbitration agreements imposed as a condition of employment, the Ninth Circuit is treating arbitration agreements the same as California treats all contracts.

G. The Decision Below Construing State Law Does Not Discriminate Against Arbitration; It Recognizes The Inequality of Negotiating Power Inherent In the Ordinary Employment Relationship

Contrary to Petitioner's claim (Petitioner's Brief, p. 17, n.11), *Principal Mutual Life Insurance Co. v. Vars, Pave, McCord & Freedman*, 65 Cal.App.4th 1469, 1488-1489, 77 Cal.Rptr.2d 479 (1998), requires mutuality of obligation across a wide array of contracts: "Mutuality of obligation is necessary only in bilateral contracts where there are mutual promises. . . . Problems arise . . . where the promise states a definite obligation, but the promisor has an election to perform or withdraw at its pleasure."[8]

This definition focuses the inquiry on a principal flaw in the Circuit City DRA: Ms. Ingle is bound to arbitrate disputes, but Circuit City may arbitrate, or not, at its pleasure. Since the dispute in *Principal Mutual Life* arises out of a lease agreement, it is apparent that California courts require mutuality of obligation in *all* bilateral contracts, not just pre-employment arbitration agreements.

The unconscionability principles applied in *Ingle* and cases upon which it relied are applied to a wide array of contracts: "profit-shifting" clauses in a commercial lease (*Ilkhchooyi v. Best,* 37 Cal.App.4th 395, 45 Cal.Rptr.2d 766

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[8] Respondent will not attempt to address all the side issues raised by Petitioner. Much of its brief, such as the discussion of cost-shifting in arbitration agreements, is irrelevant to the Question Presented and amounts to a venting of company grievances against the laws of California, a state in which it chooses to do business.

(1995)); automatic rent increase provisions in mobile home leases (*Vance v. Villa Park Mobile Home Estates*, 36 Cal.App.4th 698, 42 Cal.Rptr. 723 (1995)); interest rate provisions in real estate deeds of trust (*Carboni v. Arrospide*, 2 Cal.App.4th 76, 2 Cal.Rptr. 845 (1991)); *See also, A & M Produce v. FMC Corp., supra,* 135 Cal.App.3d at 486).

Each of these cases proposes a test for unconscionability that would apply only to the subject matter of the particular type of contract before that court. For example, in *Carboni,* the court requires an inquiry into the rate of interest to determine whether the rate shocks the conscience. If it does, the provision is substantively unconscionable. (*Carboni, supra*, 2 Cal.App.4th at 81-82.) One cannot apply the same enforcement principle to employment arbitration agreements which contain no rates of interest. That does not suggest that the *Carboni* appellate court was prejudiced against real estate lenders. Yet this is precisely the argument Petitioner posits here: that California courts are biased because they have constructed tests that apply only to employers.[9]

In fact, the *Armendariz* and *Carboni* courts each heeded the California legislature. The Legislative Committee Comment to CC § 1670.5 notes under "Purposes" that the question, always, "is whether, *in light of the general background and the needs of the particular case,*

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[9] Petitioner conflates its arguments, contending that a rule that treats employers differently from other powerful contracting entities amounts to a differing treatment of arbitration agreements. It does not. While prejudice against employers would be unfair and possibly unlawful, it would not necessarily offend FAA Section 2.

the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." [Emphasis added.]

California courts, and the Ninth Circuit applying directives from California's Supreme Court, have created standards and frameworks specifically to analyze pre-employment arbitration agreements. These principles do not discriminate against employers or arbitration. They do, however, assure consistency in the various courts that must decide whether these provisions in employment agreements, like all contracts, meet the minimum standard of fairness imposed by the legislature.

VI. CONCLUSION

Pre-dispute employment arbitration agreements are alive and well in California. After *Armendariz* and *Ingle*, California employers know what provisions a pre-employment arbitration agreement must contain, and what it must not. Most employers and their legal counsel appreciate this clarity. Without the tests designed specifically to address issues that arise about employment arbitration agreements, drafters of these provisions would be required to guess how courts would apply principles of unconscionability like "meaningful opportunity to negotiate" or "surprise." By developing particularized criteria,

California courts have engaged in an undertaking they have unquestionable authority to pursue.

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Supreme Court, U.S.
FILED
JAN 6 - 2004
OFFICE OF THE CLERK

(2) (2)

No. 03-604 AND No. 03-605

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,
v.
CATHERINE INGLE,
Respondent.

CIRCUIT CITY STORES, INC.,
Petitioner,
v.
PAUL MANTOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN REPLY TO OPPOSITIONS TO PETITIONS FOR WRITS OF CERTIORARI

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BRIEF IN REPLY TO OPPOSITIONS TO PETITIONS FOR WRITS OF CERTIORARI

Respondents' opposition briefs[1] only confirm that certiorari should be granted in these cases. The question presented is not, as respondents suggest, Ingle BIO ("BIO") at 11, one of California law. Rather, it is a critical question of *federal* law: whether the Federal Arbitration Act ("FAA") preempts the arbitration-specific application of state unconscionability doctrine to invalidate arbitration agreements. The lower courts are divided on that question, and nothing in respondents' briefs shows otherwise. Nor can respondents rebut the fact that the decision below turns critically on a presumption against enforcement of mandatory employment arbitration agreements.

Instead, respondents argue that selective application of state-law rules to void employment arbitration agreements is justified by the inequality of bargaining power inherent in the employment relationship. BIO at 11-13, 15-17. This Court, of course, has rejected just such arguments. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); Ingle Pet. ("Pet.") at 20-24. In any event, respondents' merits argument is not a reason to deny certiorari. If there is any genuine question as to whether state-law rules may be applied selectively to invalidate employment arbitration agreements, then the Court should grant certiorari to reaffirm *Gilmer* and clarify that the FAA preempts arbitration-specific application of a state's unconscionability doctrine.

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[1] The petitions in *Circuit City Stores, Inc. v. Ingle* (No. 03-604) and *Circuit City Stores, Inc. v. Mantor* (No. 03-605) have been consolidated. For convenience, petitioner has filed one reply brief in response to both briefs in opposition to certiorari, and refers to respondents Ingle and Mantor jointly as "respondents."

I. A CONFLICT EXISTS AMONG THE LOWER COURTS ON THE SCOPE OF FAA PREEMPTION.

Though respondents attempt to rebut petitioner's showing of a stark conflict among the lower courts on the question presented, they are entirely unsuccessful. This is not a case, as respondents would have it, in which different state laws lead to different results. BIO at 11. Rather, the courts are divided on the federal-law question of when the FAA preempts the application of state rules to invalidate arbitration agreements.

The Ninth Circuit below, like the Second Circuit and the California Supreme Court, asks only whether the state-law rule may be classified on its face as a rule of general application, such as "unconscionability." *See* Pet. at 13-14. But any fair reading of the decisions of the First and Third Circuits and the Alabama Supreme Court shows that this is just the *beginning* of the FAA preemption inquiry in those jurisdictions. A court must then ask a second question: Is the state-law rule of general applicability being used in a manner that singles out, or is specific to, the arbitration context? If so, that selective application is preempted by the FAA. *See* Pet. at 14-16. Even the lower courts themselves have begun to recognize the conflict among them. *See Armendariz v. Found. Health Psychare Servs.*, 6 P.3d 669, 692 (Cal. 2000) (noting conflict with Alabama Supreme Court). Respondents' arguments about state law are irrelevant, and do nothing to harmonize the conflicting cases.

II. THE DECISION BELOW TURNS ON A PRESUMPTION AGAINST ENFORCEMENT OF EMPLOYMENT ARBITRATION AGREEMENTS THAT IS ARBITRATION-SPECIFIC ON ITS FACE.

Respondents do not dispute that the decision below invalidates petitioner's arbitration agreement because, in the view of the Ninth Circuit, it is insufficiently "bilateral." *See*

Pet. at 9-10 (describing holding below). As petitioner has shown already, that holding rests on an entirely new presumption that all mandatory arbitration contracts in the employment context – regardless of their express terms – are impermissibly one-sided and hence unenforceable. Even an agreement that *by its own terms* binds both employers and employees is presumptively unenforceable. According to the Ninth Circuit, one must presume that such an agreement will not operate bilaterally in practice because employees have less bargaining power and more claims to arbitrate than their employers. Pet. at 8-9, 17-18; Pet. App. 13a. In short, the decision below turns critically on a presumption against enforcement of employment arbitration agreements that by its very terms is arbitration-specific.

Respondents do not (and cannot) dispute this plain reading of the opinion below.[2] Instead, they attempt to justify the Ninth Circuit's arbitration-specific presumption of invalidity on the merits, by resuscitating the "inequality of bargaining power" argument first rejected by this Court more than a decade ago in *Gilmer* and again rejected in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). In both *Gilmer* and *Adams*, this Court held squarely that concerns about inequality of bargaining power and fairness to employees cannot justify a refusal to enforce mandatory employment arbitration agreements, and that rulings to the contrary are inconsistent with the pro-arbitration federal policy reflected in the FAA. *See* Pet. at 20-21. Respondents' merits arguments, like the decision below, cannot be reconciled with this Court's precedent. If there were any doubt on that score – which there is not – that would not be a reason for denying certiorari. On the contrary, such "doubt" would only con-

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[2] Respondents do argue that the Ninth Circuit's new presumption of invalidity applies only to "mandatory" employment arbitration agreements. BIO at 16. Both the petitions here deal with just such "mandatory" agreements, so that the Ninth Circuit's presumption indisputably applies and respondents' arguments are beside the point.

firm the need for prompt review by this Court so as to put to rest any lingering questions about the scope and vitality of its holdings in *Gilmer* and *Adams*.

CONCLUSION

This Court should resolve the conflict among the federal circuits and state supreme courts on the important issue of the enforcement of employment arbitration agreements pursuant to the FAA. Respondents have offered no compelling argument against this Court's consideration and resolution of that dispute. By granting certiorari, this Court can ensure that lower courts will not use state-law unconscionability doctrine to contravene this Court's precedents and the pro-arbitration public policy articulated in the FAA.

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